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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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MENOMINEE TRIBE OF INDIANS, *et al.*,  
*Petitioners,*

v.

THE UNITED STATES OF AMERICA,  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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Dated: May 25, 1984  
Washington, D.C.





## THE QUESTIONS PRESENTED

1. Whether the six-year statute of limitations for an Indian tribe to file suit against the United States for mismanagement of a tribal forest was tolled during a period of years where:

- (a) the forest was held in trust by the United States in a strict fiduciary capacity;
- (b) government agents exercised complete control of the forest's management (as Congress ordered by the Act of March 28, 1908), for over 75 years.
- (c) the Indians lacked technical forestry expertise and were totally dependent on government agents for management of the forest; and
- (d) the facts of mismanagement (suppression of new growth and excess timber mortality because of failure to cut enough timber) were unknown to the Indians and could not have been discovered by them, without the advice of outside forestry experts.

2. Whether a claim based upon the failure of government officials to discharge their statutory fiduciary responsibilities to an Indian tribe is completely beyond the jurisdiction of the courts where a) the actions complained of were taken by those officials in the course of implementing a statute calling for termination of the trust but during the period when the trust was still in effect and b) Congress' instruction to provide the Indians with "reasonable assistance" during the windup of the trust was specifically violated.



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THE UNITED STATES OF AMERICA,  
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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Petitioners, the Menominee Tribe of Indians, *et al.*, respectfully pray that a writ of certiorari issue to review the judgments, orders and opinions of the U.S. Court of Appeals for the Federal Circuit in *Menominee Tribe, et al. v. United States*, Docket No. 134-67A, hereinafter called "Deed Restrictions" and *Menominee Tribe, et al. v. United States*, Docket No. 134-67B, hereinafter called "Forest Mismanagement."

**OPINIONS BELOW**

Review is hereby sought of the decisions of the U.S. Court of Appeals for the Federal Circuit reported at 726 F.2d 712 and 726 F.2d 718. The court's opinion of December 30, 1983 (*Deed Restrictions*) is reproduced as Appendix A to this Petition and its opinion of January 24, 1984 (*Forest Mismanagement*) is reproduced as Appendix B to this Petition.<sup>1</sup>

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<sup>1</sup> The Trial Judge's unpublished Findings and Opinions of January 2, 1981 (*Deed Restrictions*, hereinafter cited as "T.J. 134-67A") and April 4, 1980 (*Forest Mismanagement*, hereinafter cited

## JURISDICTION

Judgments of the Court of Appeals were entered on December 30, 1983 in *Deed Restrictions* and on January 24, 1984 in *Forest Mismanagement* (rehearing denied February 16, 1984). A motion for extension of time to May 28, 1984 within which to file this petition was granted March 16, 1984, by the Chief Justice (App. C) and this Petition was filed within the extended period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

The Menominee Termination Act, 25 U.S.C. §§ 891-902, reprinted as Appendix D.

The Menominee Restoration Act, 25 U.S.C. §§ 903-903f, reprinted as Appendix E.

The Act of March 28, 1908, 35 Stat. 51, 3 Kapp. 317, reprinted as Appendix F.

## STATEMENT OF THE CASE

This case has its genesis in the now-discredited "termination" policy of the 1950's when Congress declared a general policy to end the special status of Indians, ostensibly to "grant them all of the rights and prerogatives pertaining to American citizenship."<sup>2</sup> While ad-

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as "T.J. 134-67B"), were the subject of a motion to waive requirement of printing, filed April 17, 1984, denied by the Court on May 21, 1984, with notice reaching counsel on May 23, 1984, so that it was impossible to have these voluminous materials printed prior to the time for filing this Petition. As suggested to counsel by the Clerk of the Court, these materials will be printed and filed with the Court as soon as possible. They will be contained in supplemental Appendices G and H respectively, with the original pagination noted in brackets. Page references to the Trial Judge's Findings and Opinions in this Petition are to the bracketed page numbers in Appendices G and H.

<sup>2</sup> H.R. Con. Res. 108 (Senate concurring), 83rd Cong., 1st Sess., 67 Stat. B132 (1953).



vocates of termination justified it as an "emancipation" of Indians from injurious federal control, it has long been clear in hindsight that the inevitable effect of "termination", where it was tried, was to erode Indian rights and gravely worsen conditions on terminated reservations.<sup>3</sup>

In 1954, Congress decided that the Menominees were ready for termination of federal tutelage and protection, and passed the Menominee Termination Act.<sup>4</sup> Under the terms of that Act, the Menominees were required to formulate a plan for the termination of their federal rights and status—a procedure that gave them at least the possibility of retaining some semblance of their tribal existence.<sup>5</sup> The Menominees were strongly opposed to termination but lacked the political power to prevent passage of the Termination Act. They did fight a delaying action,<sup>6</sup> but, in the end, were forced to bow to

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<sup>3</sup> As stated in President Nixon's historic message to Congress of July 8, 1970 (Special Message to the Congress on Indian Affairs, (1970), Pub. Papers 564 (Richard M. Nixon), the rights of Indian tribes did not result from acts of legislative grace but had been bargained and paid for by the Indians. The President noted that the Indians "surrendered claims to vast tracts of land and have accepted life on government reservations" and that "the special relationship between the Indian tribes and the federal government which arises from these agreements continues to carry immense moral and legal force." He concluded that "[t]o terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American" and that the "termination" policy should be abandoned because "the practical results have been clearly harmful in the few instances in which termination actually has been tried."

<sup>4</sup> 68 Stat. 251 (1954), as amended, 25 U.S.C. §§ 891-902 (1963) (App. D).

<sup>5</sup> See discussion in *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>6</sup> The Act was amended on four separate occasions, ultimately extending the date when termination was to become effective from December 31, 1958 to April 30, 1961. (T.J. 134-67A, Fdg. 27, pp. 121-22).

the will of Congress, to prepare and submit a termination plan by a date certain.<sup>7</sup>

The Menominees' desperate fear of termination proved well founded.<sup>8</sup> Before long, it was recognized that the forced termination of the Menominees coupled with the failure to give them adequate preparation for the change, had been a tragic mistake (T.J. 134-67A, Fdgs. 90-94, pp. 155-58). Social and economic conditions of the Menominee community became so hopeless that less than 12 years after the Termination Act was implemented on the Reservation, Congress passed the Menominee Restoration Act, reversing "termination." 87 Stat. 770 (1973); 25 U.S.C. § 903 (1976) (App. E).

In restoring the Menominees to federal status, the Congress itself, throughout the legislative history of the Restoration Act, documented, as the Trial Judge did below (*see* T.J. 134-67A, Fdgs. 95-105, pp. 158-67), the tragic results of the Menominee Termination Act.<sup>9</sup>

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<sup>7</sup> An amendment to the Termination Act required that the Secretary of the Interior turn all their trust property over to a private trustee if they failed to submit the required plan. They feared that this alternative would inevitably have led to complete obliteration of their tribal existence. T.J. 134-67A, Fdgs. 79-82, pp. 151-52; Fdg. 100, p. 161; T.J. Op. pp. 17-18.

<sup>8</sup> Long regarded as one of the most socially and economically advanced American Indian tribes, the Menominees who, as the Trial Judge concluded, were in no way prepared to manage their own affairs at the time of termination, were swiftly plunged into an abyss of poverty and severe social disorder. (T.J. 134-67A, Op. pp. 31-35). Menominee County, which was created by the State of Wisconsin contemporaneously with the implementation of the Termination Act and which was co-extensive in area with the boundaries of the old Menominee Reservation, became the poorest county in the State.

<sup>9</sup> Congressman Haley described the Termination Act as "one of the unfortunate moves that the Congress made." 119 Cong. Rec. 34301-02 (1973). Congressman Saylor, speaking in favor of the Restoration Act and referring to the "mistaken" termination policy noted that the Restoration Act would not "*undo the human suffering and economic damage imposed on these people over the*

Prior to the passage of the Restoration Act in 1973, the Menominees, believing that the Termination Act had severely damaged them, brought suit in the Court of Claims to recover damages for their losses.<sup>10</sup> Trial Judge Louis Spector found that these damages, in the instant cases, amounted to \$36,495,915. (See T.J. 134-67A, p. 111; T.J. 134-67B, p. 54).

## The Specific Menominee Termination Claims

### A. Background

The Menominee Tribe settled on their heavily forested reservation in Wisconsin pursuant to the 1854 Treaty of Wolf River.<sup>11</sup> In 1908, Congress directed the Bureau of Indian Affairs to assume complete control over the Menominee forest and to operate it on a "sustained-yield" basis as a commercial venture, in conjunction with a saw-mill, for the benefit of the Menominee Indians.<sup>12</sup>

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*past 20 years.*" 119 Cong. Rec. 34302 (1973) (emphasis added). See also S. Rep. No. 581 (Menominee Restoration Act), 93rd Cong., 1st Sess. 3-4 (1973).

<sup>10</sup> Under controlling legal precedents, the Menominees were advised that they could not obtain redress for the immense social injury they had suffered as a result of termination. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194, 1200 (Ct. Cl. 1970); *Seminole Nation v. United States*, 498 F.2d 1368, 1375-76 (Ct. Cl. 1974). Therefore, their claims were narrowly focused on the economic damage done to their property by the Government during the termination process.

We will never know how they would have fared under termination had the Secretary of the Interior properly carried out his trust obligations to the Menominees during the period of tribal preparation for termination. As determined by the Trial Judge, much of the economic damage suffered by the Tribe after termination is entirely traceable to the premature withdrawal of federal supervision and protection, and to misconduct of officers of the Department of the Interior, during the termination process, in violation of their continuing fiduciary duties. See detailed discussion, *infra* at 8-9, 12-13.

<sup>11</sup> See *Menominee Tribe v. United States*, *supra*, 391 U.S. at 405-06 for a full discussion of the meaning of that Treaty.

<sup>12</sup> Act of March 28, 1908, 35 Stat. 51 (App. F).

Although a number of Menominees were employed in the forest and the Menominee mill, all jobs at the managerial level during the period of the Bureau of Indian Affairs' trusteeship (which terminated in 1961) were held by government agents. During this period the tribal members were totally dependent upon the officials and agents of the Bureau of Indian Affairs and were not trained to take over the management of their forest assets (*see* T.J. 134-67B, Op. p. 6).

## B. The Deed Restriction Claim

### 1) *The facts*

Under the provisions of the Termination Act, as amended, the Menominee forest after termination was to be managed on a "sustained-yield" basis (*see*, Act of July 14, 1956, 70 Stat. 549, 25 U.S.C. § 89). This was not a departure from the past since commercial operations in the Menominee forest, under the 1908 Act, had always been subject to a "sustained-yield" requirement, *i.e.*, following the guiding principle that amount of timber harvest should not exceed the annual growth of the forest.<sup>13</sup> But the benefit of the "sustained-yield" requirement mandated by Congress was turned into something far different and pernicious through concerted actions of the Department of the Interior and the State of Wisconsin.

In order to survive as a tribe and maintain their identity, the Menominees intensely wanted to have their own separate county after termination. They also needed to obtain some relief from the State of Wisconsin with respect to taxes on the cutting and sale of their timber, which their new, emancipated status subjected them to for the first time (T.J. 134-67A, Fdg. 52, p. 134).

Wisconsin officials, who had originally proposed to turn the Menominee Reservation into a *public* park and de-

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<sup>13</sup> *See Menominee Tribe v. United States*, 117 Ct. Cl. 442, 463-66, 507-08, 91 F. Supp. 917, 931-32 (1950).

sired to preserve its character as a forest wilderness for *public* benefit, drove a hard bargain. They insisted that—in return for Wisconsin passing the necessary laws to give the Menominee their own county and tax relief<sup>14</sup>—the Termination Plan developed by the Menominees provide that administration of the “sustained-yield” provision contained in the Termination Act be subject to complete Wisconsin State control. To assure pervasive State control Wisconsin also demanded that the Menominee forest be placed under a 30-year restriction against alienation—something that was without any statutory basis in the Termination Act itself. (T.J. 134-67A, Op. pp. 39-40).

Even though he had not yet been released from his fiduciary duties as the Menominees’ trustee, and despite his recognition that the State’s demands would impair the Menominees’ property, the Secretary of the Interior refused to get involved in the negotiations with the State.<sup>15</sup>

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<sup>14</sup> T.J. 134-67A, Fdg. 62, pp. 138-39. The State laws, however, and particularly the tax law, were required as much by the State of Wisconsin, to protect its interests, as by the Menominees. *Id.*, Fdg. 64, p. 140, Op. pp. 43-44.

<sup>15</sup> The Secretary of the Interior on July 16, 1959, when the Menominees were still under federal supervision and protection, sent the following telegram to the Menominee Advisory Council:

Reurtel July 9 concerning state legislative proposal for thirty year restrictive covenant on sale Menominee Forest property, *we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens.* In answer your specific query does Secretary have right to do this, we believe we can but would do so reluctantly only because you appeal that it is only way Menominees can get State legislation they want. Also it is in \* \* \* accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale covenant in the deed provided Menominees give their consent, \* \* \*.” (emphasis added).

(T.J. 134-67A, Fdg. 70, p. 143).



He approved the plan and ultimately deeded the trust property of the Menominee Tribe to Menominee Enterprises, Inc., subject to the terms of the agreement which the Menominees who, as the Trial Judge found, "were in fact not prepared to manage their own affairs and to conduct their own negotiations." (T.J. 134-67A, p. 145) had been forced to make with the State. (*Id.*, Fdgs. 73-80, pp. 145-51). Their failure to stand up to the State's demands was to be expected in a people who had always been discouraged from making important decisions on their own, who found themselves "'in the middle' and left largely to their own devices in dealing with federal and state governments, neither of which was prepared or disposed to treat with the problems of termination confronting the Menominees." (*Id.*, Fdgs. 70-72, pp. 143-44). (See also *id.*, Op. pp. 24-26). The State took unconscionable advantage amounting to duress while federal government officials turned their backs.

Pursuant to the State's demand, restrictions were placed in the deed "for the benefit of the State of Wisconsin" (*Id.*, Op. p. 19) that required operation of the forest on a *State regulated* "sustained-yield" basis (*id.*, Fdg. 168, pp. 190-91, Op. p. 41) and went on to preclude *any* sale of the land for 30 years without the consent of Wisconsin officials (*Id.*, Op. p. 20). Under this authority, lacking any trust obligations to the Menominees, the State of Wisconsin could require the operation of the Menominee forest as a park for the benefit of the State's citizens.

This action seriously reduced the value of what remained to the Menominees (T.J. 134-67A, Op. p. 87) so that as they ventured out into the white world, without federal protection and special federal status, they lacked essential property rights in their chief asset, their forest. They could not mortgage their property to raise funds for necessary capital improvements. They could not, without State permission, cut a sufficient volume of timber to

keep their forest healthy. To make matters worse, they were locked into a negligently prepared forest management plan, discussed below, which ensured minimal disturbance to the aesthetic values of the forest, the paramount interest of Wisconsin officials at the time, and prevented the Menominees from realizing the full potential that sustained-yield would allow.

## 2) *The decision below*

Suit was commenced in the United States Court of Claims in 1967 and the claims were tried in 1971. Eventually the claims were divided into separate dockets. In Docket No. 134-67A, "*Deed Restrictions*" the trial judge ruled that the actions, described above, were a breach of trust and that damages were due to the Menominee Tribe in the amount of \$29,300,000 (*Id.*, Op. p. 111). On appeal the Court of Appeals reversed without reaching the merits of the trial judge's breach of trust determination, but entirely on the ground that the court had no jurisdiction to entertain the claim.

Relying on the Court of Claims decision in *Menominee Tribe v. United States*, 607 F.2d 1335 (known as *Menominee Basic*), the court below held that the claim was barred under the holding in *Menominee Basic* "that the United States could not be liable for any action of the Interior Department, in the implementation of the Termination Act, unless that action 'violated the Constitution or some outstanding directive of Congress.'" (607 F.2d at 1345). (App. A at 7a).<sup>16</sup>

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<sup>16</sup> The Court of Appeals also rejected the trial judge's alternative theory that the imposition of the Deed Restrictions "for the benefit of the State of Wisconsin" was constitutional taking of tribal property. The court reasoned that the restrictions imposed were essentially continuations of regulatory requirements which had existed prior to termination and that the tribe had not been deprived of its property rights by imposition of these restrictions. If certiorari is granted, we also reserve the right to argue that the

### C. The Forest Mismanagement Claim

#### 1) *The facts*

In the 1950's, the Secretary of the Interior, reacting to the judicial finding of mismanagement of the Menominee forest by *clear-cutting* in *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 91 F. Supp. 917 (1950),<sup>17</sup> went to the opposite extreme of *undercutting* the forest—a type of mismanagement perhaps even more injurious to the health of the forest. While ruinous clear-cutting was obvious to anyone,<sup>18</sup> “undercutting” was not perceivable in its occurrence or result to anyone other than a trained forester armed with detailed inventory and growth data.<sup>19</sup> It produced immense damage through the death of over-mature timber and suppression of normal growth of new timber. (T.J. 134-67B, Fdgs. 36, 37, 99, Op. pp. 20-21).

While the amount of timber to be cut on the reservation was limited by Congress in the 1908 Act to 20 million board feet per year (20 MMBF), history had shown that this limitation was subject to adjustment and that Congress depended upon the officials of the Department of the Interior to advise it of the appropriate level of cut

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deed restrictions effected a Constitutional taking of an interest in the Menominee forest by vesting in the State of Wisconsin the authority to control cutting in the forest and forbid its alienation by the Menominees.

<sup>17</sup> In the period 1910-1928, government officials, acting squarely contrary to the congressional directive that the forest be managed on a “sustained-yield” basis, caused large portions of that forest to be clear-cut with resultant significant damage to the health of the forest.

<sup>18</sup> This is apparent from the description of the forest in *Menominee*, 117 Ct. Cl. 493-97, 91 F. Supp. at 924-26.

<sup>19</sup> In recognition of that fact, the Trial Judge limited damages to the period beginning after the government foresters had accumulated sufficient technical data to alert them to the “actual conditions (of) the forest.” T.J. 134-67B, Op. p. 37. *See also id.*, Fdg. 40, p. 78.



or of other changes in management of the forest.<sup>20</sup> Indeed, on 3 different occasions, Congress had approved amendments to the 1908 Act changing the level of cut for various reasons.<sup>21</sup> On this record, as determined by the undisturbed findings of the Trial Judge, severe under-cutting occurred during the period 1951-1961 when government managers of the Menominee forest, acting contrary to their own informed judgment, annually undercut, by a wide margin, the appropriate amount of stumpage which would have fostered healthy growth of the Menominee forest and ensured reasonable compensation to its Indian owners. The federal officials never took appropriate steps to obtain congressional change of what they knew was an inappropriate level of cut.<sup>22</sup>

The Bureau's passive and negligent management of the trust assets of the Menominees during the period between the consideration of the Termination Act in 1954 and its ultimate implementation in 1961, seemed to reflect a view that passage of the Termination Act in some way had weakened the continuing federal trust arising from the congressional directives contained in the 1908 Act. (App. F).

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<sup>20</sup> See *Menominee* 117 Ct. Cl. at 506-07, 91 F. Supp. at 931.

<sup>12</sup> T.J. 134-67B, Fdgs. 7-9, pp. 60-61; T.J. Op. pp. 30-31. In 1911 the limitation was temporarily expanded to 40 MMBF to permit the cutting of dead and down timber. Act of March 3, 1911, 36 Stat. 1076. In 1949, Congress allowed an additional 5 MMBF per annum to be cut over a 3-year period (Act of May 31, 1949, 63 Stat. 144); and in 1956 it amended the limitation to allow, on a permanent basis, 2 MMBF of timber other than sawlogs to be cut in addition to the 20 MMFB of sawlogs. Act of July 14, 1956, 70 Stat. 553.

Over the years, other amendments to the Act were adopted to remedy difficulties of administration not having to do with allowable cut. Act of May 18, 1916, 39 Stat. 123, 157; Act of March 2, 1917, 39 Stat. 969, 991-92; and Act of January 27, 1925, 43 Stat. 793.

<sup>22</sup> T.J. 134-67B, Fdgs. 23-33, pp. 69-74, 36-43; pp. 75-79.

In point of fact, during the period from the passage of the original Termination Act in 1954 until April 30, 1961, the effective date of termination of federal supervision, the government trusteeship of the Menominee Tribe and its assets was legally unchanged. However, in this period instead of winding up the trust with the great care required of a prudent trustee, the government agents treated the Tribe and its problems adversely at arm's length (T.J. 134-67A, Op. p. 21) and "began to withdraw the services it had traditionally provided prior to the passage of the Act."<sup>23</sup> As noted, it took no effective action to advise Congress of the need to increase the annual cut to levels necessary for the health of the forest. (*Id.* at 29-31). It refused to implement plans for construction of a veneer plant which all agreed would have significantly increased tribal income. (T.J. 134-67B, Fdgs. 58-65, pp. 86-88, Op. p. 25). Menominee Indians' prime veneer timber was allowed to be manufactured into ordinary lumber.<sup>24</sup> The government did not even make sure that the most valuable kinds of timber were cut in order to maximize tribal income.<sup>25</sup>

There was one area in which the Bureau of Indian Affairs did provide substantial, if misguided assistance. Under the provisions of Section 7 of the Termination Act, the Tribe was given the option and the right to obtain "reasonable assistance" from the Bureau of Indian Affairs in the preparation of integral elements of its Termination Plan. (App. D. at 27a-28a).

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<sup>23</sup> *Id.* at 25. Soon after the Termination Act was passed, the Bureau of Indian Affairs cut its Menominee Agency staff by over 50 percent, despite the local bureau officials' pleas for more government support to aid the Menominees in preparing for the difficult process of termination. T.J. 134-67A, Fdgs. 56-57, pp. 136-37.

<sup>24</sup> Cf. actual veneer output and realistic veneer output. T.J. 134-67B, Fdg. 76, pp. 96, 110.

<sup>25</sup> 34.3% of the total average cut, 1951-1960 was devoted to low-value hemlock at the expense of the more valuable timber. *Id.* at 92-93. See also, Fdgs. 50-53, pp. 84-85.

At that point, having, as the trial court found, no knowledge or suspicion of the serious mismanagement through the undercutting of their forest that had occurred in the decade of the 1950's (T.J. 134-67B, Op. p. 51) the Tribe requested that the very same government forester, Lee Winner, who was responsible for forest administration during that period, prepare a forest management plan that would govern the cutting of timber in the tribal forest *subsequent* to termination.<sup>26</sup> As found in detail by the trial judge, Mr. Winner's plan was so negligently prepared that its adoption made successful operation of the forest in the post-termination period a virtual impossibility, on either a commercial or silvicultural basis.<sup>27</sup>

## 2) *The decision below*

In Docket No. 134-67B (Forest Mismanagement) the trial judge, on April 4, 1980 awarded damages in the amount of \$7,195,915 of which \$4,317,500 was attributable to government mismanagement prior to termination in 1961 and \$2,878,415 for the post-termination period. (T.J. 134-67B, Op. p. 54).

On appeal the Court of Appeals reversed, concluding that the entire claim for the pre-termination period (1952-1961) was barred by the statute of limitations in

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<sup>26</sup> T.J. 137-67B, Fdgs. 29-32, pp. 74-75. This plan was to be approved by the new state-chartered corporation, Menominee Enterprises, Inc., which would have control of the forestry enterprise.

<sup>27</sup> T.J. 134-67B, Fdgs. 90-92, pp. 124-31, Op. pp. 47-48. The plan provided for an increase of the annual cut from 22 to over 30 million board feet, but imposed such unsound restrictions as to where that cut could be made that they precluded attainment of the desired level. These could not be varied without the consent of State officials whose interests were contrary to those of the Menominee Tribe, and the inevitable result was continued substantial loss in the years after termination took effect (*Id.*, Fdgs. 90-92, pp. 124-31).

that suit, was filed in 1967 more than six years after the claim accrued. (App. B at 19a-20a). The court rejected the idea that the statute of limitations was "tolled" while the Menominees' property was held in trust by the United States or under the "blameless ignorance" doctrine, even though the Menominees did not know and could not themselves have determined the fact that the government was seriously damaging their forest by undercutting. The court held that the facts of the claim could have been discovered by the Menominees, if they had hired necessary experts to investigate them, and that this was enough to prevent a tolling of the statute.

With respect to the post-termination claim for the period after 1961 dealing with the government's negligent preparation of a forest management plan, the court, following its ruling in *Menominee Basic*, determined that the claim involved was beyond the jurisdiction of the court because the plan involved was an integral part of the "implementation" of the Termination Act and

" 'as part of that [p]lan . . . the forest management plan cannot be assessed or evaluated by the Court of Claims or the Claims Court (or by us) and cannot be considered within current judicial jurisdiction to vindicate a claim for money damages against the United States for breach of trust.' " (App. B at 22a).

### REASONS FOR GRANTING THE WRIT

1. The application of the statute of limitations by the court below conflicts with this Court's decision in *United States v. Mitchell*<sup>28</sup>

The decision of the Court of Appeals, in *Forest Mismanagement* on the application of the statute of limitations to Indian claims, raises an important question on the scope of the federal trust involved in the manage-

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<sup>28</sup> 463 U.S. —, 103 S. Ct. 2961, 51 U.S.L.W. 4999 (1983) (hereinafter *Mitchell*).

ment of Indian timber. In *Mitchell* this court rejected the government's argument that the only redress available to the Indians for breach of fiduciary duty was an action for "declaratory, injunctive or mandamus relief" against the Secretary of the Interior. The decision below squarely conflicts with the resolution of that issue in *Mitchell* where this court held as follows:

"To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." <sup>29</sup>

Compare the sharply conflicting language the Appeals Court used in rejecting the Menominees' claim that the statute of limitations was tolled because they were blamelessly ignorant of the government's mismanagement:

"Plaintiffs charge Interior's officials with that very knowledge which was also available to the Indians if they sought advice.

\* \* \* \*

"Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, '[t]he facts were all available,' and the running of limitations would not be tolled as if they were 'unknowable.'" <sup>30</sup>

In *Menominee Forest Mismanagement*, the federal trust involved was every bit as broad in scope as that

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<sup>29</sup> 103 S. Ct. 2973 (emphasis added).

<sup>30</sup> App. A at 17a-18a (emphasis added).



considered in *Mitchell*,<sup>31</sup> and the Indians were equally dependent on their trustee<sup>32</sup> for the management of their forest.

Yet the court below concluded that the Menominees' undercutting claim was not "inherently unknowable," and was, therefore, barred by the statute of limitations.

This ruling not only creates a duty to monitor the federal trustee's actions inconsistent with this court's ruling in *Mitchell*, but also ignores the trial court's determination that although the undercutting practiced by the government foresters in the Menominee forest was known by them to be injurious to the health and profitability of the forest and the foresters reported those facts to their superiors,<sup>33</sup> the facts were completely unknown to the Indians.<sup>34</sup> The Menominees had no reason to do anything but totally rely on the government foresters on whom they had always depended. As this court determined in *Mitchell*, they had no duty or reason to hire outside experts to monitor the government foresters' work.<sup>35</sup>

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<sup>31</sup> See *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 917 F. Supp. 917-932 (1950).

<sup>32</sup> Act of March 28, 1908 (App. F); see, T.J. 134-67B, Op. p. 6; Statement *infra* at 8-9.

<sup>33</sup> T.J. 134-67B Fdgs. 20-33, pp. 68-75; Fdgs. 38-43, pp. 77-79.

<sup>34</sup> *Id.*, Op. pp. 50-51. Forester Winner testified that the 1952 inventory was but a "preliminary step" and that additional data was needed to complete the picture of the condition of the Menominee forest. This ultra-conservatism, which the trial judge found on the basis of the evidence to constitute mismanagement (particularly when the forester greatly delayed seeking the additional data), possibly explains the failure of the foresters to educate the Menominees in the problem. *Id.*, Fdgs. 24-31, pp. 73-75.

<sup>35</sup> There is no merit to the Court of Appeals' assertion (App. B at 18a) that the Menominees are chargeable with knowledge of their undercutting claim because (1) in 1956 they requested Congress, by resolution, to increase the allowable annual cut by 2

The Appeals Court's decision also flatly conflicts with *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), a well-reasoned and often-cited decision where, in a claim of government mismanagement of tribal funds, the statute of limitations was deemed tolled by reason of the trust relationship between the parties, until the wrong was revealed by an accounting, or the trust was terminated. Whether or not the rule of *Pomo* is correct (*i.e.*, that the statute of limitations is tolled by the existence of the trust relationship itself until the trust is ended), we submit that the combined effect in the instant case of the trust relationship and the Indians' lack of knowledge of the government's wrongful conduct present an *a fortiori* case.<sup>36</sup> A non-Indian might not be able to avoid the

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MMBF, and (2) that they had successfully brought an earlier suit against the United States based upon clear-cutting of parts of the forest, in violation of the sustained-yield requirement of the 1908 Act (*Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). (See the Court's description of the kind of ruinous clear-cutting practiced, 117 Ct. Cl. at 497-98).

First, the Indians' participation in requests addressed to Congress for an increase in the allowable cut of 2 MMBF (a figure far below that the Menominee foresters knew was required) shows only that when advised to do so by the government foresters, they lent tribal support to the foresters' suggestions to Congress.

Second, the Menominees' success in 1951 in obtaining a settlement against the United States for mismanagement of the forest is irrelevant. The fact that the Menominees at one time realized they had a claim resulting from the government's engaging in a particularly obvious and ruinous clear cutting (*see* App. B at 18a; T.J. 134-67B, Op. pp. 30-31) in no way establishes that they had the requisite skill and knowledge to enable them to know, then or at a much later time, whether the forest was being undercut (a much more sophisticated and invisible problem), or if so, whether the BIA was taking the necessary action to solve it.

<sup>36</sup> The Appeals Court accepted that a trust relationship did exist between the government and petitioners, App. B at 18a, but stated:

statute of limitations on the ground of "blameless ignorance" if the facts of the government's wrong were discoverable through the use of expert assistance or other means. However, the existence of the trust relationship, as this court held in *Mitchell*, means—if it means anything at all—that the Indians were entitled to rely on their trustee for their knowledge of the facts during the pendency of the trust, even during the period when the government was in the process of terminating that trust relationship but before termination became effective.<sup>37</sup>

Finally, the decision below presents an important question of general law affecting many plaintiffs in that it conflicts with the much-cited rule of *Urie v. Thompson*,

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" '[t]he statute of limitations applies to Indians the same as to anyone else' (except, perhaps, in the presence of an *express* trust which likewise does not exist here)." *Id.* at 19a.

The duties assumed by the government and the degree of control over the Menominee timber under the 1908 Act (App. F) were just as great or greater than those assumed over the Quinault allottees under the Act of June 25, 1910, considered in *Mitchell*. (See Statement, *supra* at 10). Accordingly, the government's pre-termination relationship with the Menominees and their forest is no different from one described in Section IIIA of this Court's opinion in *Mitchell*, 103 S. Ct. at 2969. The conclusion that "the language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship" and that "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds)," (*id.* at 2972) applies as well to the Menominees. Of course, the fact that the 1908 and 1910 Acts do not use the word "trust" is of no more significance to the finding of an express trust than the absence of that word in the 1910 Act considered in *Mitchell*. See also *Duncan v. United States*, 667 F.2d 36, 43 (1981), *cert. denied*, 51 U.S.L.W. 3938 (July 6, 1983).

<sup>37</sup> The Court of Claims itself recognized the validity of such a rule in the case of *Duncan v. United States*, *supra*, 667 F.2d at 44, where the Court held that the "trust" relationship between the United States and an Indian Rancheria which was to be terminated continued in full force until termination was in effect.



337 U.S. 163 (1949), (and its progeny) that a statute of limitations is tolled if a plaintiff can show "blameless ignorance" of the fact of his injury and its cause.<sup>38</sup> 337 U.S. at 169-170. This rule has been applied by the federal courts to claims brought under the Tucker Act as well as the Federal Torts Claims Act.<sup>39</sup>

Once the fact of injury and its cause are known, the statute begins to run and a plaintiff has the duty to inquire of professionals to see if he has been legally wronged and file his suit within the time period allowed. *United States v. Kubrik*, 444 U.S. 111, 122 (1979). But this duty applies only to a plaintiff armed with knowledge of his injury and its cause who is "no longer at the mercy of a defendant's specialized knowledge." *Stoleson v. United States*, 628 F.2d 1265, 1269-70 (7th Cir. 1980).

The decision below turns this doctrine on its head in ruling that the statute was not tolled because the Menominees *could* have discovered the "facts" of the injury to their forest "if they sought advice." (App. B at 18a). If this were the rule, then the plaintiff in *Urie* should have had his claim time-barred since expert advice might have informed him that years of exposure to

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<sup>38</sup> The insidious damage to the forest in the instant case is much like the situation in *Urie* in that the plaintiff there was exposed for many years to the cause of his affliction and suffered deterioration without realizing either that he had suffered an injury or the cause of that injury.

<sup>39</sup> *Watts v. United States*, 611 F.2d 550 (5th Cir. 1980); *Sanders v. United States*, 551 F.2d 458 (D.C. Cir. 1977); *Casias v. United States*, 532 F.2d 1339 (10th Cir. 1976); *Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975); *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974); *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973); *Tyminski v. United States*, 481 F.2d 257 (3rd Cir. 1973); *Toal v. United States*, 438 F.2d 222 (2nd Cir. 1971); *JAPWANCAP, Inc. v. United States*, 178 Ct. Cl. 630, 373 F.2d 356, cert. denied, 389 U.S. 971 (1967); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962).

silica dust was damaging to his health, even though the symptoms had not manifested themselves to him.

As developed above, the Menominees had no notice that their forest was being undercut and the insidious nature of the damage—an apparently healthy forest in which new growth was suppressed through undercutting—made it impossible for them to know the *fact* of their injury until many years after the damage occurred. In these circumstances, despite the Bureau of Indian Affairs' knowledge of the damage,<sup>40</sup> the Court of Appeals erred in reversing the trial judge's determination that the statute of limitations was tolled until some time after 1961 when the facts of injury were discovered by the Menominees.

**2. The decisions of the court below raise significant questions about the jurisdiction of federal courts to hear Indian breach of trust claims where the breach involves actions implementing the provisions of a federal statute**

In holding that the actions of the Secretary of the Interior were immune from judicial scrutiny—if they could be viewed as “implementation” of the Menominee Termination Act—the Court of Appeals has established a far-reaching and erroneous precedent of immense importance to every Indian tribe in the United States. By ruling that the courts have no jurisdiction to adjudicate breach of trust claims arising from actions performed under color of statutory authority, the court below would, in effect, vitiate the accountability of the United States to Indian tribes in the implementation of statutes imposing trust duties on the United States enacted for the benefit

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<sup>40</sup> Contrary to the position apparently taken by the court below, (App. B at 17a), “blameless ignorance” of a plaintiff is not negated by knowledge in someone else, particularly the defendant, that the plaintiff has suffered an injury at the hands of the defendant. *See, e.g., Spevak v. United States*, 300 F.2d 977 (Ct. Cl. 1968).

of the tribes.<sup>41</sup> *United States v. Mitchell*, 103 S. Ct. 2961 (1983).

All authority of the Secretary of the Interior and of the officials and agents of his Department comes from statutes. Departmental activity is in some sense always an implementation of some Act of Congress. If the activity in fact results in mismanagement of Indian assets and the Indians suffer damages, *Mitchell* tells us that the Indians have no recourse to the federal courts *unless* the action was undertaken pursuant to the Constitution or an Act of Congress or regulation of an executive department. If a wrong, to be justiciable, must arise in connection with the implementation of a statute it cannot at the same time be said—as the Court of Appeals did below—that if an act is performed in asserted implementation of a statute, it is not justiciable. The courts must do what the Appeals Court refused to do—look to the nature of the Act to determine whether it violated a duty assumed by the United States pursuant to statute or by some other means.

In *Menominee Tribe v. United States* (known as *Menominee Basic*), the Court of Claims determined that it lacked jurisdiction to hear claims based upon the assertion that Congress, itself, had violated the government's trust responsibility to the Menominee Tribe through passage of the Termination Act.<sup>42</sup> We do not challenge this ruling here.<sup>43</sup> However, when faced with application of the *Menominee Basic* rule and the principles laid down by

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<sup>41</sup> See statement of Congressman Jackson, 92 Cong. Rec. 5312-13 (1946) reporting Department of Interior approval of Section 24 of the Indian Claims Commission Act (28 U.S.C. § 1505) because it did not want to be in a position where it could mishandle Indian funds and property without being held accountable.

<sup>42</sup> 607 F.2d 1335, 1337-39 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980).

<sup>43</sup> The Petition for certiorari filed in that case was limited to consideration of the claimed *Congressional* breaches of trust.

this Court in *Mitchell* to the specific Menominee claims, the Court of Appeals below went far beyond the ruling in *Basic* and created a new kind of executive branch immunity that has no basis in logic or in law. The most flagrant violation of the principles of *Mitchell* is in the *Forest Mismanagement* case where the Court of Appeals ruled there was no jurisdiction in the Claims Court to consider the specific claim of whether the Secretary of the Interior provided "reasonable assistance" required and requested by the Tribe in the formulation of a forest management plan, or whether the assistance provided was so carelessly contrived that it ultimately did more harm than good.<sup>44</sup>

We submit that the Claims Court clearly had jurisdiction to consider this breach in the same way that the court would have jurisdiction if the Secretary had simply refused to give the Menominees *any* of the statutorily mandated assistance they requested. In giving the Menominees the right to request "reasonable assistance" from personnel of the Bureau of Indian Affairs, Congress expected the Indians to rely upon that assistance and expected the assistance to be rendered prudently and in the best interest of the Indians, consistent with Congress's

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<sup>44</sup> Under the provisions of Section 7 of the Termination Act, App. D at 27a-28a, petitioners had the right to receive "reasonable assistance" from the Secretary of the Interior in making preparation for termination. The Tribe, having been totally dependent upon BIA management of the forest throughout the history of its development, turned to BIA Forester Winner to prepare a post-termination Forest Management Plan. Preparation of this Plan required particular care for the newly terminated Tribe necessarily had to rely on its provisions as it learned to conduct its affairs without federal assistance. Moreover, the Plan could not be changed without the concurrence of Wisconsin officials. Despite these considerations, the Respondent's forester negligently prepared a plan which locked the Menominees into a destructive and inflexible cutting pattern, reducing the Tribe's allowable cut. This resulted in serious damage to the Menominee forest after termination. (See, T.J. 134-67B, Fdgs. 90-93, pp. 124-32).

directive. (*United States v. Mitchell*, 103 S. Ct. 2961, 2972 (1983)).

The Court of Appeals, after noting that the Forest Management Plan was an integral part of the Termination Plan authorized by the Menominee Termination Act, made the incredible decision that the claim must be dismissed because "matters connected with and authorized by the Termination Act are all beyond the jurisdiction of the Court of Claims and the Claims Court." (App. B at 21a).

Similarly erroneous was the sweeping immunity accorded by the court below in *Deed Restrictions* to actions of the Interior Department which led to the imposition of a "sustained-yield" requirement and a 30-year restraint on alienation<sup>45</sup> both administered by the State of Wisconsin. The decision below in *Deed Restrictions* goes so far as to hold that the courts could not examine the Secretary of the Interior's failure to aid the Menominees in their negotiations with the State, despite his knowledge that the State of Wisconsin was making demands which he characterized in a telegram as "unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens."<sup>46</sup> The Court of Appeals ruled that this course of conduct "fully accorded with the [Termination] Act" (App. A at 5a) and was therefore immune from judicial scrutiny. The court

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<sup>45</sup> Contrary to the Court of Appeals' decision the Menominee complaint is not that they were subject to a "sustained-yield" requirement which Congress had authorized in the Termination Act (App. A at 6a-10a), but rather that the requirement would be administered by the State of Wisconsin for the benefit of its citizens, and not for the benefit of the forest's Indian owners. The coupling of that with a 30-year restraint on alienation—not authorized by the Termination Act—made state control pervasive for the 30-year period and, contrary to the Court of Appeals undocumented conclusions, was neither "fully consonant with the Act" nor an "effort to enforce the statutory mandate of sustained yield management." (App. A at 7a).

<sup>46</sup> See note 15 *supra*.



did not even discuss petitioners' argument that the comprehensive trust established by the 1908 Act (App. F), which remained in effect until termination was proclaimed in 1961 (*See Statement, supra* at 5-6 and T.J. 134-67A, Fdg. 26 H, p. 120, Op. pp. 40-41), required the Secretary to assist the Menominees when he was put on notice of the overreaching demands of the State. The Secretary apparently knew (as indicated by his telegram quoted above n. 15) that these inequities would diminish the value of the trust corpus if embodied in the final termination plan. (*See* T.J. 134-67A, Op. p. 85).

History teaches that the trust relationship between American Indian tribes and the United States is in a constant state of flux. The 19th Century policy of integrating Indians into the general society, embodied in such actions as the General Allotment Act (25 U.S.C. § 331), was replaced by a recognition of a need to allow Indians to maintain their separate tribal existence on their own reservations as embodied in the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*). This, in turn, was replaced by the termination policy and various Termination Acts<sup>47</sup> of the 1940's and 1950's of which the Menominee Termination Act is a most notable example.

At present, the policy has shifted again in the direction of recognizing tribal sovereignty and allowing Indian people to maintain a separate existence. Under the Indian Self-Determination Act,<sup>48</sup> the Indian tribes are

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<sup>47</sup> For example, Wyandotte Termination Act of August 1, 1956, 25 U.S.C. §§ 791-807; Peoria Termination Act of August 2, 1956, 25 U.S.C. §§ 821-826; Ottawa Tribe of Oklahoma Termination Act of August 3, 1956, 25 U.S.C. §§ 841-870. Ponca Tribe of Nebraska Termination Act of September 5, 1962, 25 U.S.C. §§ 971-980.

<sup>48</sup> 25 U.S.C. §§ 450 *et seq.* This Act allows the tribes, under contract with the Department of the Interior and/or the Department of Health and Human Services to administer for themselves Indian programs for which those two departments have responsibility.

encouraged to assume responsibility for programs heretofore administered on their respective reservations, by the Bureau of Indian Affairs and other governmental agencies.

If the decisions below are allowed to stand, officials of the United States will be free to violate their trust responsibilities to Indians as long as they are able to demonstrate that they are implementing some Congressional program for change in the trust relationship. In the context of the Indian Self-Determination Act, Interior Department officials would be free to disregard their trust responsibilities to Indians before a given program was effectively turned over to the Indians for administration. In the context of the Menominee Termination Act or other Termination Acts that may be enacted in the future, the Indians would lose the protection of the federal trust before that trust was effectively ended.<sup>49</sup>

We submit that Congressional intention to so abrogate Indian trust rights, like abrogation of treaty rights, should not be lightly imputed.<sup>50</sup> We submit that the Indians are entitled to the full protection of the federal trust as long as the duties of that trust continue. The integrity of the law requires that phase-out trust duties Congressionally mandated—such as the statutory provision to provide the Menominees “reasonable assistance” in termination planning—be enforceable in court to the same extent as the Congressionally mandated on-going trust duties considered by this Court in *Mitchell*.

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<sup>49</sup> See n.37, *supra*.

<sup>50</sup> See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

**CONCLUSION**

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 25, 1984  
Washington, D.C.



# **APPENDICES**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

Appeal No. 134-67A

THE MENOMINEE TRIBE OF INDIANS, *et al.*,  
*Appellees,*

v.

THE UNITED STATES,  
*Appellant.*

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DECIDED: December 30, 1983

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Before RICH, DAVIS, BENNETT, MILLER and SMITH, *Circuit Judges.*

DAVIS, *Circuit Judge.*

We revisit here the multi-faceted litigation brought in 1967, in the Court of Claims, by the Menominee Tribe of Indians (and some of its members and representatives), as a result of their dissatisfaction with the Menominee Termination Act of 1954, Pub. L. No. 399, ch. 303, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902 (1970). A sketch of the background of the suit is given in the unanimous *in banc* opinion of the Court of Claims in *Menominee Tribe of Indians v. United States*, 607 F.2d 1335, 1337-39 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980), which passed upon "the general issue of whether the United States is liable to appellees for breach of trust on account of the enactment and putting

into effect of the Termination Act", 607 F.2d at 1338.<sup>1</sup> Before us now is one aspect of the overall suit—the so-called "Deed Restrictions" claim, involving appellees' challenge to the restrictions on the future use and disposition of the Menominee lands which were established by the termination plan adopted and put into effect under the Termination Act.

Prior to the decision of the Court of Claims in *Menominee Basic* in October 1979, the trial judge of that court had rendered (in March 1979) a recommended decision and finding on this "deed restrictions" aspect of the general case. He ruled that appellees were entitled to receive \$29,300,000, either for breach of trust or for a Fifth Amendment taking. After *Menominee Basic*, appellees moved the Court of Claims to remand this part of the case to the trial judge for reconsideration of his opinion, findings, and conclusion in light of *Menominee Basic*. The court did so in June 1980. Without calling for further briefing or argument by the parties, the trial judge filed (on January 2, 1981) the opinion, findings, and conclusion which are now before us. He again ruled for appellees, in the same amount and on the same alternative bases.<sup>2</sup> We reverse and order dismissal of these claims.

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<sup>1</sup> This decision is familiarly known as *Menominee Basic* because it dealt with the plaintiffs' basic claim, and was so denominated by the Court of Claims. See 607 F.2d at 1335. We shall refer to that opinion and decision by that shortened description.

<sup>2</sup> While the Court of Claims still existed, the Government filed a petition for review by the Article III bench of that court, which did not decide it. Pursuant to an October 4, 1982 order of this court, the Claims Court entered judgment on October 8, 1982, corresponding to the decision recommended in this case by the trial judge. The case was transferred on October 1, 1982, to this court under section 403 of the Federal Courts Improvement Act of 1982, 96 Stat. 57-8 (April 2, 1982).

## I

*The Deed Restrictions*

The claims presented here by the Tribe concern two land restrictions included in the Menominees' termination plan (which is reproduced at 26 Fed. Reg. 3727). That plan provided that the deed conveying the reservation land under the Termination Act would contain the following:

THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:

1. That the lands conveyed hereby shall be operated on a sustained yield basis until released therefrom under the laws of Wisconsin or by act of Congress.

2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

Plaintiffs contend, and the trial judge held, that these two restrictions—which we shall call the “sustained yield provision” and the “30-year restriction”—amounted either to a breach of fiduciary duty by the United States or to a Fifth Amendment taking without just compensation.

## II

*Menominee Basic*

*Menominee Basic* is the matrix of much of our current decision; the court there said expressly that all the specific claims under this overall suit—including the two claims particularly involved here—“will, of course, have

to be decided within the limits of our [*i.e.*, the Court of Claims'] jurisdiction" as discussed in that opinion. 607 F.2d at 1345. It is necessary, therefore, to recall the rulings *Menominee Basic* made. First, the court broadly declared that the Court of Claims could not entertain any non-constitutional claims (including a claim for breach of fiduciary trust) that Congress itself violated any duty toward the Tribe by passing and enacting the Termination Act.<sup>3</sup> 607 F.2d at 1344-45. Second, the court held likewise—*i.e.*, that no vindicable claim existed—with respect to any non-constitutional claim that the Interior Department violated its fiduciary duty through its participation in the enactment and implementation of the Termination Act, unless it were shown that the Department breached a provision of that Act or of some other statute.<sup>4</sup> 607 F.2d at 1345-46. Third, the decision squarely held that further proceedings on the specific claims, such as those now before us, could be litigated

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<sup>3</sup> The opinion said:

The jurisdictional barrier against our appraisal of Congress's action in enacting the Termination Act covers (a) any evaluation of Congressional motives or the interests Congress was pursuing; (b) any alleged failure of Congress to prepare the Menominees for termination, to make a full and fair disclosure to them of all pertinent facts, to allow further time before termination was effected, to give greater assistance to the Indians in the termination process, to reconsider the policy of termination, to adopt modified legislation, or to determine before final amendment of the Act whether the Tribe and its members were ready to assume management and control of their property and affairs; and (c) any alleged duress or pressure by Congress or its members on the Menominees to obtain their consent to termination.

<sup>4</sup> In that connection the court declared that Interior was required by the Termination Act to provide reasonable assistance in the formulation of the termination plan only to the extent requested by officials of the Tribe. The court also held that the Secretary of Interior could not disapprove the termination plan "if he thought the Menominees unprepared for termination, or that he could delay termination on that ground". 607 F.2d at 1346, n.24.

only "insofar as they do not rest on Congress' (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act". 607 F.2d at 1347.

*Menominee Basic* did not treat constitutional claims, and specifically left open all "claims said to arise under the Constitution". 607 F.2d at 1347.

### III

#### *Breach of Fiduciary Duty*

In his discussion of breach of fiduciary duty, the trial judge wholly disregarded the instructions and holdings of *Menominee Basic*. Directly contrary to the explicit teachings of that decision (*see especially* fn. 3, *supra*,<sup>5</sup>), he extensively considered, and based his ruling on, the Congressional motives in passing and enacting the Termination Act, the alleged inadequate preparation of the Tribe for that termination, the alleged inadequacy of the measures to aid the Tribe to be ready for the termination, and the alleged pressures and decisions in the Tribe to accept termination. *Menominee Basic* pointed out that those were all beyond the court's jurisdiction and should not be taken into account. When these extraneous considerations are subtracted from the case (as they must be), and when the terms and objectives of the Termination Act are accepted at face value (as they must be), it is apparent that the two deed restrictions, far from being a vindicable breach of trust, fully accorded with the Act and gave rise to no justiciable claim for breach of trust.

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<sup>5</sup> With respect to the Interior Department, *Menominee Basic* also ruled beyond the Court of Claims' jurisdiction any liability "because the Interior Department did not itself undertake to try to stop Congress or to advise or persuade it differently or to do more than Congress required of it in order to prepare the Menominees for the termination Congress had ordered". 607 F.2d at 1345.

### A. Sustained Yield

The amended Termination Act expressly provided: "The [termination] plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. \* \* \* The sustained yield management requirement contained in [the Termination Act] \* \* \* shall not be construed by any court to impose a financial liability on the United States". 25 U.S.C. § 896 (1964 ed.). Under *Menominee Basic* this sustained yield provision, which Congress specifically enacted in the Termination Act, could not be challenged in the Court of Claims as a breach of a fiduciary duty. The sustained yield provision demanded by the Termination Act was in fact included in the deed to the Menominees of the Reservation land, dated April 26, 1961, a deed issued pursuant to that Act. The Interior Department, together with the Tribe, simply implemented the explicit requirement of the Termination Act. For that, no liability for breach of fiduciary duty can possibly result—as *Menominee Basic* held.

Some argument is made that Interior improperly modified the statutory requirement by providing that the sustained yield mandate could be released either by the laws of Wisconsin or by Congressional act. Because appellees' claim is that the imposition of the sustained yield requirement reduced the value of the Menominee land, it is hard to see how they could be injured by inclusion of mechanisms for earlier release of that allegedly detrimental requirement.<sup>6</sup> In any event, those "release" provisions do not violate the purpose or terms of the Termination Act—do not take this case outside of the rulings of *Menominee Basic*. The statute specifically called upon

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<sup>6</sup> Nothing in the sustained yield provision of the deed compelled the Menominees to end the sustained yield program if Wisconsin or the Federal Government released them from the requirement. The choice remained with the Indians to continue the program if they wished to do so.



Interior to see that the termination plan "conforms to applicable Federal and State law". 25 U.S.C. § 896, *supra*. That requirement supports the reference, in the termination plan as well as in the deed, to both federal and Wisconsin law on release of the sustained yield requirement.

### B. 30-Year Restriction

Though not mandated by the Termination Act, the joint acceptance (in the plan and deed) of the 30-year restraint on alienation is likewise fully consonant with the Act, and therefore not chargeable as a breach of trust.<sup>7</sup> The 30-year restraint was an effort to enforce the statutory mandate of sustained yield management. The termination plan so characterized it.<sup>8</sup> Moreover, this restriction formed part of an arrangement under which the Tribe received a state tax advantage for maintaining the forest (or higher beneficial uses) for a long period. This could obviously be deemed important for the economic success of the post-termination Tribe, which was to be obtained (in part) by the sustained yield mandate.<sup>9</sup>

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<sup>7</sup> *Menominee Basic* held that the United States could not be liable for any action of the Interior Department, in the implementation of the Termination Act, unless that action "violated the Constitution or some outstanding directive of Congress." 607 F.2d at 1345.

<sup>8</sup> The plan said:

To better insure the welfare of the Menominee people \* \* \* deed covenants were agreed upon which will enforce the maintenance of the sustained yield principles in the care and preservation of the forest. It is believed that within thirty years sustained yield will have served the ultimate benefit of the Menominee people as a tribe, at the end of which time the owners can reassess their condition.

<sup>9</sup> Appellees argue that Wisconsin could exert extensive powers over the Menominee land as a result of the state's power to vary taxation of the land unless the Tribe agreed to the state's position on management of the forest and restrictions on alienation. Even if we assume the correctness of these assertions, they would not amount to a justiciable claim for breach of fiduciary duty by the



## IV

*Fifth Amendment Taking*

The court below indisputedly had jurisdiction to pass upon appellees' claims that the deed restrictions amounted to a Fifth Amendment taking without just compensation. (*Menominee Basic* did not consider that aspect of the overall case or of this segment. See 607 F.2d at 1339-40.) We believe, however, that the trial judge erred in his alternative ruling that imposition of these provisions did constitute such takings. We hold, instead, that they were permissible regulations and that there is no proper claim for just compensation.<sup>10</sup>

*A. Sustained Yield*

Unlike some other Indian termination legislation, the Menominee Termination Act did not provide for, or contemplate, the general sale or transfer of the Menominee land to third parties; nor was the United States to assume ownership of the land. Cf. *Klamath and Modoc Tribes v. United States*, 436 F.2d 1008 (Ct. Cl.), cert. denied, 404 U.S. 950 (1971). The Menominee Tribe was expected to continue its own ownership. In that situa-

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*Federal Government.* First, insofar as Wisconsin was permitted to exert such power by virtue of the termination of federal control, that followed from the choice of Congress to enact the Termination Act—a matter *Menominee Basic* held outside of the jurisdiction of the Court of Claims. Second, potential misuse or improper use by Wisconsin of its authority after termination cannot be charged to the Federal Government. The deed restrictions themselves—the only matters with which this suit is concerned—do not contemplate any such state power. The reference in the deed to the two deed restrictions being “for the benefit of the State of Wisconsin”, *supra*, merely gave that State the power to enforce the restrictions if they were violated.

<sup>10</sup> We by-pass, without reaching, appellant's argument that the Menominees fully consented and agreed to these restrictions and are therefore barred from urging them as a taking.

tion the sustained yield provision was simply the continuation of a regulatory requirement which had long existed for the Menominee forest and which Congress considered important for the future economic health of the Tribe. This regulation was imposed under the Congress' plenary authority to regulate Indian-owned forests. The Tribe never had unfettered ownership of the land; nor was that kind of ownership given to them in the Termination Act; accordingly, no property right was taken from the Indians when Congress required continued management on the sustained yield basis.

In *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 499, 509 (1950), the Court of Claims held that the Act of March 28, 1908, 35 Stat. 51, required the Government to manage the Tribe's forest on what was, in effect, a sustained yield system. That requirement of the 1908 Act continued until termination in April 1961. Imposition of that requirement, one often used for Indian forests, was obviously within the Congressional authority over Indians. See *United States v. Mitchell*, U.S. Sup. Ct., No. 81-1748, decided June 27, 1983. In the course of assessing the original Termination Act, Congress amended it to include the same sustained yield directive after termination, for the very purpose of continuing the benefits of that policy to the Indians.<sup>11</sup> Because of its power over disposition of Indian property, Congress had the right so to condition its transfer of the land to the Tribe. *Tiger v. Western Investment Co.*, 221 U.S. 286, 315-16 (1911). This refusal to grant unencumbered fee simple title to the Tribe was not the deprivation of any existing property right entailing Fifth Amendment compensation.<sup>12</sup>

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<sup>11</sup> It appears from the legislative history that the Menominee council approved and its counsel supported the amendment.

<sup>12</sup> Appellees mistakenly assume that Congress first granted full, unencumbered title to them and then imposed the sustained yield

The addition to the plan and the deed of provision for release of the sustained yield requirement by federal or Wisconsin law does not push the sustained yield directive into the compensatory category. As we have observed, *supra*, fn.6 and text at fn.6, those "release" provisions had no compulsory or injurious effect on the Menominees' use of the land; they did not take anything away from the Indians which the Tribe previously possessed. For the same reasons, those additions did not convey any of plaintiffs' property to Wisconsin simply because Wisconsin law could release or refuse to release the Menominees, if the Indians wished to accept that release, from the sustained yield mandate. Neither the Termination Act nor the termination plan gave broader authority to the state.<sup>13</sup>

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requirement. The true fact is that Congress restricted the transfer when it first made the transfer in the Termination Act.

That Congress did not, and did not intend to, grant unencumbered fee title to the Indians is shown, among other things, by the specific provision in the Termination Act (25 U.S.C. § 896 (1964 ed.)) that the sustained yield management requirement "shall not be construed by any court to impose a financial liability on the United States". Congress recognized by that proviso that it was not granting the Menominees the plenary title that would be a necessary prerequisite for a taking. The trial judge thought that this proviso was limited to claims of forest mismanagement following termination but nothing in the broad text or the legislative history indicates that the proviso's sole objective was directed at the post-termination period when the Federal Government would no longer have control over the forest.

<sup>13</sup> Appellees are wholly wrong in saying that the United States gave Menominee property to Wisconsin. We have already touched, in our discussion of the claim for breach of trust (see fn. 9, *supra*), on the Tribe's complaint that termination enabled Wisconsin, through its powers of taxation, to have great power over the Menominee land. Here, too, those assertions, if true, would not found a claim against the United States—this time for a constitutional taking. The United States would not take the Indians' property by terminating federal control of and supervision over the land, and forcing the Menominees to live on the same basis as

### B. 30-Year Restriction

The same principles demonstrate that the 30-year restriction falls short of being a Fifth Amendment taking. The United States could lawfully condition the transfer of the land to the Tribe on the latter's agreement not to alienate the land for a period of thirty years.<sup>14</sup> Restrictions on alienation are common with respect to Indian lands. See, e.g., *United States v. Mitchell*, 445 U.S. 535, 540-41 (1980); *Tiger v. Western Investment Co.*, 221 U.S. 186, 315-16 (1911). But even if we assume, contrary to our belief, that this restraint was invalid, that conclusion would not equate to the finding of a constitutional taking. The core principle is that there can be no such taking where, as here, no pre-existing property right is taken from the owner by the Government. Because there was no taking the plaintiffs could not obtain compensation under the Fifth Amendment for the allegedly unlawful imposition.

## V

### Mootness

Appellant insists that the case has become moot as a result of the Menominee Restoration Act of 1973, 25 U.S.C. §§ 903 *et seq.*, which returned the Menominee forest to federal trust status some 12 years after the termination of federal supervision and the imposition of the two deed restrictions. We reject the argument of mootness because, if appellees prevailed on any of their

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other United States citizens. Wisconsin might be liable for improper action it took, but not the Federal Government.

<sup>14</sup> In order to find a Fifth Amendment taking, we have to assume that Congress authorized the Interior Department to include the 30-year restriction in the transfer deed. If the Department's agreement to this restriction was *ultra vires*, there could not possibly be a Fifth Amendment taking which calls for initial authorization by Congress.

claims, they might prove to be entitled to some monetary recovery (even though materially less than the trial judge awarded). The case cannot as yet be called entirely moot.

## VI

### *Conclusion*

On these grounds, we hold that the court below was without jurisdiction of large portions of this case, and that (as to the claims within that court's jurisdiction) appellees have not shown any sustainable claim.<sup>15</sup> The decision below must be reversed with directions to dismiss the complaint in this Docket No. 134-67-A.<sup>16</sup>

*REVERSED.*

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<sup>15</sup> We hold, in particular, that appellees have not proved any violation by Interior of the Termination Act in the respects left open by *Menominee Basic*, or of any other federal statutes.

<sup>16</sup> In view of our holdings in this opinion, it is unnecessary to consider the detailed exceptions the appellant has made to the various findings of fact by the trial judge. Those findings all fall with our direction to dismiss the complaint.

## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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Appeal No. 134-67BTHE MENOMINEE TRIBE OF INDIANS, *et al.*,  
*Appellants and Cross-Appellees,*

v.

THE UNITED STATES,  
*Appellee and Cross-Appellant.*

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DECIDED: January 24, 1984Before RICH, DAVIS, BENNETT, MILLER and SMITH, *Circuit Judges.*DAVIS, *Circuit Judge.*

This is another segment of the many-phased suit brought by the Menominees against the Federal Government in 1967, in the Court of Claims, to recover for a variety of alleged violations of their rights. Recently we issued our opinion in the so-called "Deed Restrictions" claim (*Menominee Tribe of Indians v. United States*, No. 134-67A, decided December 30, 1983). That opinion recalls the general background and nature of this massive litigation. Today we consider the separate "Forest Management" claim in which, after a trial, the trial judge awarded the plaintiffs \$7,195,915 for defendant's alleged mismanagement of the Indians' forest resources.<sup>1</sup> Both

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<sup>1</sup> Of this amount, \$4,317,500 was for defendant's mismanagement before April 29, 1961 (*i.e.*, prior to termination of federal control and supervision over the Menominees) and \$2,878,415 was for damages (resulting from such past mismanagement) said to continue into the post-termination period (*i.e.*, after April 29, 1961).



sides appeal, the plaintiffs asserting that the award was insufficient and the Government arguing, on various grounds, that no award could or should have been made (or, if any award was owing, it should have been in a lesser sum).

The trial judge's opinion, findings of fact, and recommended conclusion were issued on April 4, 1980, while the Court of Claims still existed. Both sides filed exceptions and briefs which the Article III judges of the Court of Claims were unable to consider before that court expired on September 30, 1982. The case is now before us for decision.<sup>2</sup> We reverse and direct dismissal of the complaint.

## II

### Background

This particular case has some, but limited, connection with the Menominee Termination Act of 1954, as amended, 25 U.S.C. §§ 891-902 (1970),<sup>3</sup> which was the main focus of the Court of Claims' decision in *Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980) ("*Menominee Basic*") and of our decision in *Menominee Tribe of Indians v. United States*, No. 134-67A, decided December 30, 1983 ("*Menominee Deed Restrictions*"). The present claim is a charge of governmental mismanagement of the Menominee forest for the 10-year period beginning July

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<sup>2</sup> Pursuant to an October 4, 1982 order of this court, the Claims Court entered judgment on October 8, 1982, corresponding to the decision recommended in this case by the trial judge. The case had been transferred on October 1, 1982, to this court under section 403 of the Federal Courts Improvement Act of 1982, 96 Stat. 57-8 (April 2, 1982).

<sup>3</sup> Termination of federal control and supervision was effected under the Termination Act on April 30, 1961. The Menominee Restoration Act of 1973, 25 U.S.C. §§ 903 *et seq.*, returned the Menominee forest to federal trust status some 12 years after termination of federal control and supervision.

10, 1951, with an alleged impact on the forest lasting into the post-termination date of the trial below. Plaintiffs' claim for redress of alleged mismanagement begins with the date of the settlement (July 10, 1951) of prior Menominee litigation concerning the forest management (*Menominee Tribe of Indians v. United States*, 118 Ct. Cl. 290 (1951)). The present suit was begun on April 25, 1967.

The principal charge of mismanagement in the period 1951 to 1961 is that the Federal Government, as fiduciary manager of the Menominee forest, obtained too low harvest income because it adhered to an unreasonably low annual harvest limitation; this annual limitation had been first set by the Congress in 1890 and continued thereafter. The contention was that the Interior Department, though it knew or should have discovered that the limitation was deleteriously low in 1951-1961, failed to seek amendment of the statutory harvest limitation from the Congress, which could not be aware (it is said) of the changing conditions necessitating such an amendment unless so informed by government management personnel. The trial judge accepted this argument of breach of fiduciary duty.<sup>4</sup>

Defendant presents a number of reasons why the decision below should be completely reversed and the complaint dismissed.<sup>5</sup> We need consider only the defenses of limitations and of lack of jurisdiction to consider actions connected with the Termination Act.

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<sup>4</sup> The trial judge rejected plaintiffs' alternative claim of a Fifth Amendment taking by virtue of the alleged mismanagement; plaintiffs have not appealed that aspect of their over-all claim.

<sup>5</sup> These include: (a) lack of any subject matter jurisdiction in the Court of Claims or Claims Court over this entire claim of breach of fiduciary duty; (b) there was in fact no breach of fiduciary duty; (c) no jurisdiction over the claim for post-termination damages; and (d) bar by the six-year statute of limitations.

## III

## Statute of Limitations

Because this suit was commenced on April 25, 1967, the six-year statute of limitations applicable to the Court of Claims would ordinarily bar plaintiffs' claim to the extent it "first accrued" prior to April 25, 1961. 28 U.S.C. § 2501. Termination of federal control and supervision, under the Termination Act, was effective April 30, 1961. 25 U.S.C. § 896; 26 Fed. Reg. 3726. On April 26, 1961, the Secretary of the Interior, pursuant to 25 U.S.C. § 897, transferred the Menominee forest by deed to the plaintiffs (or their representatives). At most, therefore, there were only one to five days in which government action with respect to the management of the forest was within the six-year period for an allowable suit.

When did plaintiffs' claim of forest mismanagement "first accrue"? The trial judge measured plaintiffs' damages from January 1, 1952; he found that from the data available at that time defendant knew or should have known that the statutory harvest limitation "was the principal and controlling cause of substantial underproductivity in the Menominee Forest", and that it was a breach of trust for the Government to fail to supplement and refine the 1952 data "expeditiously". Accordingly, there is no doubt, under the unchallenged findings made below, that all of the claim of breach of trust resulting in pretermination damages actually related to assertedly improper government activities which began and continued prior to the allowable six-year period (*i.e.*, prior to April 25, 1961). The result is that, unless the running of the six-year statute was tolled during the pre-termination period, plaintiffs' claim is barred, at least as to all pre-termination damages.<sup>6</sup>

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<sup>6</sup> As indicated in Part I, *supra*, fn. 1, pre-termination damages account for almost two-thirds of the total recovery awarded below.

The trial judge held, and the Tribe contends, that the otherwise applicable six-year limitations period was tolled for two reasons: first, the Tribe was excusably ignorant of the facts underlying its claim until it began itself to manage the forest after termination in April 1961; and, second, limitations was tolled during the whole pre-termination period because of the then-existing trust relationship between the Tribe (including its forest) and the United States. We consider each argument in turn, accepting neither.

A. The contention of tolling because of "blameless ignorance" founders on improper factual findings together with incorrect legal rulings. It is settled, for one thing, that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights. *Affiliated Ute Citizens of the State of Utah v. United States*, 199 Ct. Cl. 1004 (1972); *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971).<sup>7</sup> As to the facts,<sup>8</sup> there is here plainly no such *concealment* (e.g., imposition of secrecy) by the defendant as would admittedly toll limitations. See *Spevack v. United States*, 390 F.2d 977, 981 (Ct. Cl. 1968); *Japanese War Notes Claimants Ass'n. v. United States*, 373 F.2d 356, 358-59 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). Nor were the facts of potential injury from Interior's conduct "inherently unknowable" at the ordinary accrual date in 1952. Plaintiffs charge Interior's officials with that very knowledge which was also avail-

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<sup>7</sup> There is double reason for applying that rule in this case. *Menominee Basic, supra*, 607 F.2d at 1346, pointed out that in the termination process (beginning prior to 1954) the Tribe was represented by "skilled attorneys".

<sup>8</sup> The trial court's factual findings on the problem of "blameless ignorance" were very summary and inordinately sketchy. The formal findings simply state what plaintiffs claimed without adopting that position. The opinion says no more than that "the Indians were not skilled in the technical science of forestry and no efforts were made by defendant to prepare them adequately to take over management of their property".

able to the Indians if they sought advice. The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. In 1956, acting on a resolution of the Menominee Council, Congress made one increase in the statutory harvest limitation (said by the Indians to be insufficient). The Tribe had successfully carried on the earlier suit (on another basis) against the United States for forest mismanagement and entered into a substantial settlement in 1951. *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). At least from 1954 onward, the Indians and their attorneys participated actively in the Congressional consideration of termination and in the preparation of the termination plan. Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable". See *Affiliated Ute Citizens v. United States*, *supra*, 199 Ct. Cl. 1004 (1972).

B. We assume, without deciding, that there was a trust relationship between Interior and the Menominees with respect to the management of the latter's forest. See *United States v. Mitchell*, U.S. Sup. Ct. Oct. Term 1982, No. 81-1748, decided June 27, 1983; *Short v. United States*, 719 F.2d 1133, 1134-37 (Fed. Cir. 1983). Even so, limitations was not tolled, simply because of the existence of that trust relationship, until termination in April 1961.

The Court of Claims explicitly refused in comparable cases to toll the six-year limitation period of 28 U.S.C. § 2501 despite the fact that those Indian plaintiffs or the then-involved Indian property were under trust or in incompetent status. In *Capeoman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971), an "incompetent" Indian sued



“for recovery of certain charges made by the Government incident to the sale by it, as trustee, of the timber standing in plaintiff’s trust allotment”; the disputed charges had been made in 1946 and suit was not brought until 1969 but the plaintiff argued that the six-year period was tolled by the rule (strongly argued in the present case) that limitations does not run against a beneficiary until the trust is terminated or repudiated. The court specifically ruled that that principle did not apply to Indians, like the Menominees here, who were suing on claims that the Government has never acknowledged on the merits. 440 F.2d at 1003. The opinion likewise rejected the related contention that 28 U.S.C. § 2501 does not bar a restricted Indian’s claim against the United States for misappropriation of his trust funds. 440 F.2d at 1005-08. In the face of the unqualified terms of the limitations statute, and of the existence of other legislation modifying or waiving limitations for Indians, the court refused to read such an implied exception into the limitations provision of the Tucker Act (*i.e.*, 28 U.S.C. § 2501). *Capoeman* was followed in the summary order in *Caldwell v. United States*, 197 Ct. Cl. 1063 (1972). *Andrade v. United States*, 485 F.2d 660, 661, 664 (Ct. Cl. 1973), *cert. denied*, 419 U.S. 831 (1974), applied the same principle that an Indian trust cannot toll the statute of limitations (in the absence of concealment or unknowable facts). Finally, *Fort Mojave Tribe of Indians v. United States*, 210 Ct. Cl. 727, 728 (1976), another trust case, invoked the same rule, saying that “[t]he statute of limitations applies to Indians the same as to anyone else” (except, perhaps, in the presence of an *express* trust, which likewise does not exist here). These rulings of the Court of Claims, binding on the trial judge and on us, clearly demonstrate that the trial judge erred in holding that the Tribe’s claim for pre-termination damages was free of the bar of limitations (imposed by 28 U.S.C. § 2501) until the end of trust status in April 1961.



The sum of it is that the claim for pre-termination damages is entirely barred by limitations.

#### IV

##### *1961 Management Plan*

The trial judge held, and the Tribe maintains, that the "injuries to the Menominee Forest were perpetuated into the post-termination period by the 1961 Management Plan"<sup>9</sup> and that the Government is therefore liable for post-termination damages from April 29, 1961 through November 1, 1971 (a date shortly before the trial below). The 1961 Management Plan was drawn up in December 1960 but did not become fully effective until termination at the end of April 1961. As we have pointed out (Part III, *supra*), the six-year statute of limitations would not bar a claim arising in the last few days of April 1961. For that reason, it is said that the 1961 Management Plan, which became effective on April 30th, falls within the non-barred period. Defendant argues, on the other hand, that this portion of the plaintiffs' claim arose when the plan was earlier proposed, adopted, and made known in late 1960 and early 1961 (all within the barred period prior to formal termination). We bypass this dispute as to timeliness because we are satisfied that in any event the Court of Claims and the Claims Court had and have no jurisdiction over the Management Plan which was an integral part of the termination ordered by Congress in the Termination Act. This conclusion follows directly from the holding by the *in banc* Court of Claims in

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<sup>9</sup> This 1961 Management Plan is said by the Tribe to have "locked" the Menominees into a forest plan which seriously reduced the Indians' timber cut after termination and continued to call for unnecessary and improper undercutting of the forest. The plan was originally proposed by a government forester; the Tribe says that it had no participation in drawing up the final plan while the Government insists that the Indians fully participated. There is strong evidence supporting the Government's position.

*Menominee Basic, supra*, and also from the recent holding of this court in the *Menominee Deed Restrictions* case, *supra*, that matters connected with and authorized by the Termination Act are all beyond the jurisdiction of the Court of Claims and the Claims Court. We now spell out in more detail the reasons for that conclusion.

The Termination Act provided, in relevant part (Section 7), that the Tribe was to formulate and submit to the Secretary of the Interior "a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States including [specifying certain matters] and all other matters involved in the withdrawal of federal supervision". That the Menominee forest was directly involved in the termination plan was further shown by the following provision: "The termination plan shall contain provision for protection of the forest on a sustained yield basis \* \* \*." 25 U.S.C. § 896 (1964 ed.). The trial judge expressly found that the 1961 Management Plan "was the initial concrete implementation of the sustained yield requirement" of the Termination Act and that the 1961 Management Plan was drawn up "in preparation for termination of federal supervision and protection".<sup>10</sup> Adverting in part to the 1961 Management Plan which was included in the termination plan, the final termination plan declared (26 Fed. Reg. 3727) :

The Plan formulated and submitted by the Tribe is designed to meet the requirements of law by \* \* \* providing a sound economic base through regulation and use of communal tribal property and operation of the Menominee Forest on a sustained yield basis.

It follows that the preparation, content and impact of the 1961 Management Plan must be judicially treated as

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<sup>10</sup> The Tribe's reply brief states that the 1961 Plan was "prepared by defendant's forester pursuant to Section 7 of the Termination Act".

an integral part of the Termination Plan. As part of that Plan (and authorized by the Termination Act), the forest management plan cannot be assessed or evaluated by the Court of Claims or the Claims Court (or by us) and cannot be considered within current judicial jurisdiction to vindicate a claim for money damages against the United States for breach of trust. *Menominee Basic* precluded all court consideration of the impact of the Termination Act itself, or of Interior's actions taken pursuant to (and not in contravention of) that Act. 607 F.2d at 1344, 1344-47. *Menominee Deed Restrictions* reaffirmed that principle and specifically applied it to particular provisions of the termination plan which were contemplated and authorized by the Termination Act. Those rulings fully govern the current case and preclude the trial judge from doing what he did, *i.e.*, evaluating the drawing up and the effect of the 1961 Management Plan on the Menominee forest. The alleged deficiencies of the 1961 Management Plan fall into precisely the same class as the sustained yield and 30-year restriction requirements dealt with in *Menominee Deed Restrictions*, *supra*. Even though the portion of the Tribe's claim that rests on the 1961 Management Plan may possibly not be barred by limitations, that segment of the claim is nevertheless entirely outside the jurisdiction of the Court of Claims and the court below.

## V

### *Conclusion*

Thus, plaintiffs' entire "Forest Management" claim, now before us in this suit, is barred from consideration (for the reasons given in Parts III and IV, *supra*) and should have been dismissed. The complaint must now be dismissed, and the trial judge is so directed.<sup>11</sup>

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<sup>11</sup> The Tribe's cross-appeal on damages necessarily fails, and it is likewise unnecessary to consider the trial judge's findings of fact which must be vacated.

We are constrained to add that this is the third time that this trial judge has been reversed in these *Menominee* cases, reversals mainly compelled by the trial judge's direct disregard of controlling precedents binding on him. We expect that in the remaining segments of this general *Menominee* litigation the trial judge, if he continues with the *Menominee* cases, will not repeat that type of error. If he feels unable to conform to the controlling decisions, he should remove himself from the litigation.

*REVERSED.*

APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

No. 134-67(B)

THE MENOMINEE TRIBE OF INDIANS ETC., *et al.*,  
*Appellants,*

v.

THE UNITED STATES,

*Appellee.*

ORDER

A petition for rehearing and a suggestion for rehearing en banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing en banc is declined.

FOR THE COURT:

/s/ George E. Hutchinson  
GEORGE E. HUTCHINSON  
Clerk

February 16, 1984

cc: Jerry C. Straus  
Glen R. Goodsell

## APPENDIX D

MENOMINEE TRIBE OF WISCONSIN:  
TERMINATION OF FEDERAL SUPERVISION

## § 891. Purpose.

The purpose of sections 891 to 902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin. (June 17, 1954, ch. 303, § 1, 68 Stat. 250.)

## § 892. Definitions.

For the purposes of sections 891 to 902 of this title—

(a) "Tribe" means the Menominee Indian Tribe of Wisconsin;

(b) "Secretary" means the Secretary of the Interior. (June 17, 1954, ch. 303, § 2, 68 Stat. 250.)

§ 893. Membership roll; closures; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest.

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That applicants for enrollment in the tribe shall have three months from the date of the roll is closed in which to submit applications for enrollment: *Provided further*, That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further*, That any applicant whose application is not approved by the tribe within six months from June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application,



as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. (June 17, 1954, ch. 303, § 3, 68 Stat. 250.)

§ 894. Per capita payments to tribal members.

The Secretary is authorized and directed, as soon as practicable after June 17, 1954, to pay from such funds as are deposited to the credit of the tribe in the Treasury of the United States \$1,500 to each member of the tribe on the rolls of the tribe on June 17, 1954. Any other person whose application for enrollment on the rolls of the tribe is subsequently approved, pursuant to the terms of section 893 of this title, shall, after enrollment, be paid a like sum of \$1,500: *Provided*, That such payments shall be made first from any funds on deposit in the Treasury of the United States to the credit of the Menominee Indian Tribe drawing interest at the rate of 5 per centum, and thereafter from the Menominee judgment fund, symbol 14X7142. (June 17, 1954, ch. 303, § 5, 68 Stat. 251.)

§ 895. Management specialists; studies and reports; availability of funds; reimbursement of expenditures.

The tribe is authorized to select and retain the services of qualified management specialists, including tax consultants, for the purpose of studying industrial programs on

the Menominee Reservation and making such reports or recommendations, including appraisals of Menominee tribal property, as may be desired by the tribe, and to make other studies and reports as may be deemed necessary and desirable by the tribe in connection with the termination of Federal supervision as provided for hereinafter. Such reports shall be completed not later than February 1, 1959. Such specialists are to be retained under contracts entered into between them and authorized representatives of the tribe, subject to approval by the Secretary. Such amounts of Menominee tribal funds as may be required for this purpose shall be made available by the Secretary. In order to reimburse the tribe, in part, for expenditures of such tribal funds as the Secretary deems necessary for the purposes of carrying out the requirements of this section, there is authorized to be appropriated out of any money in the Treasury not otherwise appropriated, an amount equal to all of such expenditures incurred prior to July 2, 1958, plus one-half of such expenditures incurred thereafter, or the sum of \$275,000, whichever is the lesser amount. (June 17, 1954, ch. 303, § 6, 68 Stat. 251; July 14, 1956, ch. 601, 70 Stat. 544; July 2, 1958, Pub. L. 85-488, § 1(a), 72 Stat. 290.)

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register.

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in

the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891 to 902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secretary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sec-

tions 891 to 902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. (July 17, 1954, ch. 303, § 7, 68 Stat. 251; July 14, 1956, ch. 604, § 1, 70 Stat. 549; July 2, 1958, Pub. L. 85-488, § 1(b), 72 Stat. 290; Sept. 8, 1960, Pub. L. 86-733, § 1, 74 Stat. 867.)

§ 897. Transfer of property.

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. The Secretary is directed to begin immediate negotiations with a private trustee of his choice to perfect a trust agreement so that if by March 1, 1961, the tribal corporation is not functioning, the Secretary will be prepared to transfer title to such property to said trustee as soon after March 1, 1961, as possible, but in no event later than April 30, 1961. The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits. (June 17, 1954, ch. 303, § 8, 68 Stat. 252; July 14, 1956, ch. 604, § 2, 70 Stat. 550; July 2, 1958, Pub. L. 85-488, § 1(c), 72 Stat. 291; Sept. 8, 1960, Pub. L. 86-733, § 2, 74 Stat. 867.)

§ 898. Taxes; initial exemption; taxes following distribution; valuation for income tax on gains or losses.

No distribution, conveyance, or transfer of title to assets and no issuance or distribution of securities pursuant to the plan approved by the Secretary under the provisions of sections 891 to 902 of this title shall be subject

to any Federal or State transfer, issuance, or income tax: *Provided*, That nothing contained in sections 891 to 902 of this title shall exempt the recipient of any cash distribution made hereunder from payment of income tax for the year in which the distribution is made on that portion of his share thereof which consists of interest on funds deposited in the Treasury of the United States pursuant to the Supplemental Appropriation Act, 1952 (65 Stat. 736, 754). Following any distribution, conveyance, transfer, or issuance as aforesaid, the assets and securities which are held by, and any income derived therefrom which is received by or payable to, any person, or any corporation or organization as provided in section 897 of this title, shall be subject to the same taxes, State and Federal, as in the case of non-Indians, except that the basis of any valuation for purposes of Federal income tax on gains or losses shall be the value of the property on the date title is transferred by the United States pursuant to section 897 of this title. (June 17, 1954, ch. 303, § 9, 68 Stat. 252; Sept. 8, 1960, Pub. L. 86-733, § 3, 74 Stat. 867.)

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected.

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891 to 902 of this title shall affect the



status of the members of the tribe as citizens of the United States. (June 17, 1954, ch. 303, § 10, 68 Stat. 252.)

§ 900. Protection of minors, persons non compos mentis and other members needing assistance; guardians; other adequate means.

Prior to the transfer pursuant to section 897 of this title, the Secretary shall protect the rights of members of the tribe who are less than eighteen years of age, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate. (June 17, 1954, ch. 303, § 11, 68 Stat. 252.)

§ 901. Rules and regulations.

The Secretary is authorized and directed to promulgate such rules and regulations as are necessary to effectuate the purposes of sections 891 to 902 of this title. (June 17, 1954, ch. 303, § 12, 68 Stat. 252.)

§ 902. Contracts for completion of vocational or undergraduate college program.

Notwithstanding any other provision of section 891 to 902 of this title, the Secretary of the Interior is authorized to contract with the Wisconsin Department of Public Instruction, prior to the date for terminating Federal responsibilities, for the completion of a vocational or undergraduate college program of any member of the Menominee tribe who has been accepted for such program prior to the termination date. (June 17, 1954, ch. 303, § 14, as added Sept. 8, 1960, Pub. L. 86-733, § 4, 74 Stat. 867.)



## APPENDIX E

MENOMINEE TRIBE OF WISCONSIN:  
RESTORATION OF FEDERAL SUPERVISION  
[NEW]

## § 903. Definitions.

For the purposes of sections 903 to 903f of this title—

(1) The term “tribe” means the Menominee Indian Tribe of Wisconsin.

(2) The term “Secretary” means the Secretary of the Interior.

(3) The term “Menominee Restoration Committee” means that committee of nine Menominee Indians who shall be elected pursuant to subsections (a) and (b) of section 903b of this title. (Pub. L. 93-197, § 2, Dec. 22, 1973, 87 Stat. 770.)

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 903a, 903b, 903d to 903f of this title.

## § 903a. Federal recognition.

(a) Extension; laws applicable.

Notwithstanding the provisions of the Act of June 17, 1954, as amended, or any other law, Federal recognition is hereby extended to the Menominee Indian Tribe of Wisconsin and the provisions of the Act of June 18, 1934, as amended, are made applicable to it.

(b) Repeal of provisions terminating Federal supervision; reinstatement of tribal rights and privileges.

The Act of June 17, 1954, as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.

(c) Continuation of tribal rights and privileges.

Nothing contained in sections 903 to 903f of this title shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are now inconsistent with the provisions of sections 903 to 903f of this title.

(d) Continuation of property or contractual rights or obligations and tax obligations.

Except as specifically provided in sections 903 to 903f of this title, nothing contained in sections 903 to 903f of this title shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied.

(e) Grants for services entitled to upon Federal recognition; terms and conditions; power of Menominee Restoration Committee.

In providing to the tribe such services to which it may be entitled upon its recognition pursuant to subsection (a) of this section, the Secretary of the Interior and the Secretary of Health, Education, and Welfare, as appropriate, are authorized from funds appropriated pursuant to section 13 of this title, sections 2001 to 2004a of Title 42, or any other Act authorizing appropriations for the administration of Indian affairs, upon the request of the tribe and subject to such terms and conditions as may be mutually agreed to, to make grants and contract to make grants which will accomplish the general purposes for which the funds were appropriated. The Menominee Restoration Committee shall have full authority and capacity to be a party to receive such grants, to make such contracts, and to bind the tribal governing body as the successor in interest to the Menominee Restoration Committee: *Provided, however,* That the Menominee Restora-

tion Committee shall have no authority to bind the tribe for a period of more than six months after the date on which the tribal governing body takes office. (Pub. L. 93-197, § 3, Dec. 22, 1973, 87 Stat. 770.)

§ 903b. Menominee Restoration Committee.

- (a) Nomination and election of members; time and procedure; ballot requirements; approval by Secretary; powers of Committee.

Within fifteen days after December 22, 1973, the Secretary shall announce the date of a general council meeting of the tribe to nominate candidates for election to the Menominee Restoration Committee. Such general council meeting shall be held within thirty days of December 22, 1973. Within forty-five days of the general council meeting provided for herein, the Secretary shall hold an election by secret ballot, absentee balloting to be permitted, to elect the membership of the Menominee Restoration Committee from among the nominees submitted to him from the general council meeting provided for herein. The ballots shall provide for write-in votes. The Secretary shall approve the Menominee Restoration Committee elected pursuant to this section if he is satisfied that the requirements of this section relating to the nominating and election process have been met. The Menominee Restoration Committee shall represent the Menominee people in the implementation of sections 903 to 903f of this title and shall have no powers other than those given to it in accordance with sections 903 to 903f of this title. The Menominee Restoration Committee shall have no power or authority under sections 903 to 903f of this title after the time which the duly-elected tribal governing body takes office: *Provided, however,* That this provision shall in no way invalidate or affect grants or contracts made pursuant to the provisions of section 903a(e) of this title.

- (b) Eligible voters; notice by Secretary of nominating meeting and election.

In the absence of a completed tribal roll prepared pursuant to subsection (c) of this section and solely for the purposes of the general council meeting and the election provided for in subsection (a) of this section, all living persons on the final roll of the tribe published under section 893 of this title, and all descendants, who are at least eighteen years of age and who possess at least one-quarter degree of Menominee Indian blood, of persons on such roll shall be entitled to attend, participate, and vote at such general council meeting and such election. Verification of descendancy, age, and blood quantum shall be made upon oath before the Secretary or his authorized representative and his determination thereon shall be conclusive and final. The Secretary shall assure that adequate notice of such meeting and election shall be provided eligible voters.

- (c) Membership roll; opening; revision procedure; prerequisites for inclusion; possession and maintenance of enrollment records and materials; appeal; finality of determination.

The membership roll of the tribe which was closed as of June 17, 1954, is hereby declared open. The Secretary, under contract with the Menominee Restoration Committee, shall proceed to make current the roll in accordance with the terms of sections 903 to 903f of this title. The names of all enrollees who are deceased as of December 22, 1973, shall be stricken. The names of any descendants of an enrollee shall be added to the roll provided such descendant possesses at least one-quarter degree Menominee Indian blood. Upon installation of elected constitutional officers of the tribe, the Secretary and the Menominee Restoration Committee shall deliver their records, files and any other material relating to enrollment matters to the tribal governing body. All further work in bringing and maintaining current the tribal roll shall be

performed in such manner as may be prescribed in accordance with the tribal government documents. Until responsibility for the tribal roll is assumed by the tribal governing body, appeals from the omission or inclusion of any name upon the tribal roll shall lie with the Secretary and his determination thereon shall be final. The Secretary shall make the final determination of each such appeal within ninety days after an appeal is initiated. (Pub. L. 93-197, § 4, Dec. 22, 1973, 87 Stat. 771.)

§ 903c. Tribal constitution and bylaws.

(a) Election; time and procedure.

Upon request from the Menominee Restoration Committee, the Secretary shall conduct an election by secret ballot, pursuant to the provisions of the Act of June 18, 1934, as amended, for the purpose of determining the tribe's constitution and bylaws. The election shall be held within sixty days after final certification of the tribal roll.

(b) Distribution by Menominee Restoration Committee prior to election of proposed constitution and bylaws and brief impartial description; consultations by Committee with persons entitled to vote.

The Menominee Restoration Committee shall distribute to all enrolled persons who are entitled to vote in the election, at least thirty days before the election, a copy of the constitution and bylaws as drafted by the Menominee Restoration Committee which will be presented at the election, along with a brief impartial description of the constitution and bylaws. The Menominee Restoration Committee shall freely consult with persons entitled to vote in the election concerning the text and description of the constitution and bylaws. Such consultation shall not be carried on within fifty feet of the polling places on the date of the election.

- (c) Election of tribal officers provided for in constitution and bylaws; time and procedure for initial election; subsequent elections governed by constitution, bylaws and ordinances.

Within one hundred and twenty days after the tribe adopts a constitution and bylaws, the Menominee Restoration Committee shall conduct an election by secret ballot for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws. For the purpose of this initial election and notwithstanding any provision in the tribal constitution and bylaws to the contrary, absentee balloting shall be permitted and all tribal members who are eighteen years of age or over shall be entitled to vote in the election. All further elections of tribal officers shall be as provided in the tribal constitution and bylaws and ordinances adopted thereunder.

- (d) Majority vote necessary for passage and initial election of tribal governing body; minimum number of voters required to vote.

In any election held pursuant to this section, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate the adoption of a tribal constitution and bylaws and the initial election of the tribe's governing body, so long as, in each such election, the total vote cast is at least 30 per centum of those entitled to vote.

- (e) Revision of time periods pursuant to agreement of Secretary and Menominee Restoration Committee.

The time periods set forth in section 903b(c) of this title and subsections (a) and (c) of this section may be changed by the written agreement of the Secretary and the Menominee Restoration Committee. (Pub. L. 93-197, § 5, Dec. 22, 1973, 87 Stat. 772.)



§ 903d. Transfer of assets of Menominee Enterprises, Inc.

- (a) Negotiation and development of plan for assumption of assets; submittal of plan to Congress.

The Secretary shall negotiate with the elected members of the Menominee Common Stock and Voting Trust and the Board of Directors of Menominee Enterprises, Incorporated, or their authorized representatives, to develop a plan for the assumption of the assets of the corporation. The Secretary shall submit such plan to the Congress within one year from December 22, 1973.

- (b) Acceptance of assets by Secretary; prerequisites; pre-existing rights and obligations in assets; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred.

If neither House of Congress shall have passed a resolution of disapproval of the plan within sixty days of the date the plan is submitted to Congress, the Secretary shall, subject to the terms and conditions of the plan negotiated pursuant to subsection (a) of this section, accept the assets (excluding any real property not located in or adjacent to the territory, constituting, on the effective date of sections 903 to 903f of this title, the county of Menominee, Wisconsin) of Menominee Enterprises, Incorporated, but only if transferred to him by the Board of Directors of Menominee Enterprises, Incorporated, subject to the approval of the shareholders as required by the laws of Wisconsin. Such assets shall be subject to all valid existing rights, including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, outstanding corporate indebtedness of all types, and any other obligation. The land and other assets transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the

State of Wisconsin. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and shall be their reservation. The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation.

- (c) Transfer to Secretary of real property of Menominee Tribe members; necessity for transfer by Menominee owner or owners; preexisting rights and obligations in land; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred.

The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on December 22, 1973, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation.

- (d) Consultation by Secretary and Menominee Restoration Committee with appropriate State and local government officials for non-impairment of necessary governmental services upon transfer of assets.

The Secretary and the Menominee Restoration Committee shall consult with appropriate State and local government officials to assure that the provision of necessary governmental services is not impaired as a result of the transfer of assets provided for in this section.

- (e) Establishment of local government bodies, etc., by Wisconsin to provide necessary governmental services in Menominee County.

For the purpose of implementing subsection (d) of this section, the State of Wisconsin may establish such local government bodies, political subdivisions, and service arrangements as will best provide the State or local government services required by the people in the territory constituting, on December 22, 1973, the county of Menominee. (Pub. L. 93-197, § 6, Dec. 22, 1973, 87 Stat. 772.)

#### § 903e. Rules and regulations.

The Secretary is hereby authorized to make such rules and regulations as are necessary to carry out the provisions of sections 903 to 903f of this title. (Pub. L. 93-197, § 7, Dec. 22, 1973, 87 Stat. 773.)

#### § 903f. Authorization of appropriations.

There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 903 to 903f of this title. (Pub. L. 93-197, § 8, Dec. 22, 1973, 87 Stat. 773.)

## APPENDIX F

CHAP. 111.—An act to authorize the cutting of timber, the manufacture and sale of lumber, and the preservation of the forests of the Menominee Indian Reservation in the State of Wisconsin.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized and directed, under such rules and regulations as he may prescribe in executing the intent and purposes of this act, to cause to be cut and manufactured into lumber the dead and down timber, and such fully matured and ripened green timber as the Forestry Service shall designate, upon the Menominee Indian Reservation in the State of Wisconsin: *Provided*, That not more than twenty million feet of timber shall be cut in any one year: *And provided further*, That this limitation shall not include the dead and down timber on the north half of township numbered twenty-nine, range numbered thirteen east; the north half of township numbered twenty-nine, range numbered fourteen east, and the south half of township numbered thirty, range numbered thirteen east, on the Menominee Reservation in Wisconsin.

SEC. 2. That the Secretary of the Interior shall, as soon as practicable, cause to be built, equipped, and operated suitable sawmills, equipment and necessary buildings for manufacturing into lumber the timber cut under the provisions of this act, and there shall be employed such skilled foresters, superintendents, foremen, cruisers, rangers, guards, loggers, scalers, and such other labor, both in the woods and for operating sawmills, equipment and necessary buildings as may be necessary in cutting and manufacturing logs and lumber and in the protection of the forests upon said Indian reservation. The Secretary of the Interior in so far as practicable shall at all times employ none but Indians upon

said reservation in forest protection, logging, driving, sawing, and manufacturing into lumber for the market such timber, and no contract for logging, driving, sawing timber, or conducting any lumber operations upon said reservations shall hereafter be let, sublet, or assigned to white men, nor shall any timber upon any such reservations be disposed of except under the provisions of this act. Whenever any Indian or Indians shall enter into any contract pursuant to this act, and shall seek any agency, copartnership agreement, or otherwise to share in the same with any white man, or shall employ in its execution any labor or assistance other than the labor and assistance of Indians, such act or acts shall thereupon terminate such contract, and the same shall be annulled and canceled.

SEC. 3. That the lumber, lath, shingles, poles, posts, bolts, and pulp wood, and other marketable materials so manufactured from the timber cut upon such reservations shall be sold to the highest and best bidder for cash, after due advertisement inviting proposals and bids, under such rules and regulations as the Secretary of the Interior may prescribe. The net proceeds of the sale of such lumber and other material shall be deposited in the Treasury of the United States to the credit of the tribe entitled to the same. Such proceeds shall bear interest at the rate of four per centum per annum, and the interest shall be used for the benefit of such Indians in such manner as the Secretary of the Interior shall prescribe.

SEC. 4. That the Secretary of the Interior is hereby authorized to pay, out of the funds of the tribe of Indians located upon said reservation, the necessary expenses of the lumber operations herein provided for, including the erection of sawmills, equipment, and necessary buildings, logging camps, logging equipment, the building of roads, improvement of streams, and all other necessary expenses, including those for the protection, preservation, and harvest of the forest upon such reservation.

SEC. 5. That when the dead and down timber, and such fully matured and ripened green timber as the Forestry Service shall designate, shall have been converted into lumber, then the Secretary of the Interior is directed to make such sale of such portions of the saw-mill and manufacturing plant as will not, in his judgment, be needed for continuing operations on this reservation. The terms of these sales shall be fixed by the Secretary, and after the payment of the costs and charges of sale the net proceeds thereof shall be deposited in the same manner and for the same purposes as the net proceeds of the sale of the lumber aforesaid.

SEC. 6. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, March 28, 1908.

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No. 83-1922

FILED

JUN 7 1984

ALEXANDER L. STEVAS  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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MENOMINEE TRIBE OF INDIANS, *et al.*,  
*Petitioners,*  
v.

THE UNITED STATES OF AMERICA,  
*Respondents.*

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**SUPPLEMENTAL APPENDICES G & H TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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Washington, D.C.



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1a  
APPENDIX G  
IN THE  
**United States Court of Claims**

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TRIAL DIVISION

No. 134-67-A  
(Deed Restrictions)  
[Filed Jan. 2, 1981]

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THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902

v.

THE UNITED STATES

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Indians; imposition of restrictions on management, sale or encumbrance in deed of their tribal property to plaintiffs following termination of federal supervision and protection; jurisdiction of court over claim for breach of fiduciary duty; statute of limitations; date of accrual of claim; expert testimony, methods of appraisal; appraisal of fair market value of Menominee Forest on date of

transfer, disregarding the deed restrictions; diminution in market value by reason of involuntary, inflexible, externally-regulated sustained yield restriction in perpetuity; further diminution in market value by reason of restriction against sale or encumbrance for 30 years; effect on market value of loss of property tax exemption; trust or fiduciary relationship and breach of fiduciary duty; absence of effective consent by subjects of trust and capacity of *cestui que* trust or ward to consent to breach of trust; construction of alleged exculpatory language in amendment to Termination Act; "plenary power of Congress over Indian affairs" as defense; entitlement on alternative grounds of fifth amendment taking.

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*Jerry C. Straus*, attorney of record, for plaintiffs.  
*Frances L. Horn, R. Anthony Rogers, Philip A. Nacke, Wilkinson, Cragun & Barker*, of counsel.

*Glen R. Goodsell*, with whom was *Assistant Attorney General Kent Frizzell*, for defendant.

### OPINION \*

[2] SPECTOR, *Trial Judge*: On July 19, 1978, the trial judge issued his first opinion (designated "Basic") introducing a series of large and complex cases brought by these plaintiffs, each involving a separate money claim.<sup>1</sup> The "Basic" opinion did not itself address a specific claim for money judgment. It was published for the purpose of providing historical background for the specific claims to follow, and therefore it was not contemplated that it would be reviewed independently of those specific money

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\* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

<sup>1</sup> See note 2, "Basic" opinion of July 19, 1978, Docket No. 134-67, briefly describing the separate claims for money judgment which were to follow.



claims.<sup>2</sup> However, defendant sought review of the "Basic" or background opinion and in a decision dated October 17, 1979, the court vacated it with instructions.<sup>3</sup>

The decision of October 17, 1979 instructs that:

[28 U.S.C.] sections 1491 and 1505, as now worded, do not authorize us to entertain the unconstitutional claim [3] that the enactment of the Termination Act of 1954 was a breach of trust by Congress for which the plaintiffs can obtain money relief.<sup>[4]</sup>

It further holds that:

\* \* \* [W]e think that breach of trust resulting from the actions of officials of the Government in violation of a valid treaty or statute are quite different, and within our authority.

The opinion summarizes as follows:

We leave open issues of this type because we are not clear as to their alleged foundation. The controlling standard for further proceedings will be that the following types of claim may still be litigated: (a) claims said to arise under the Constitution; (b) claims that the Interior Department violated the

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<sup>2</sup> See note 1, "Forest Mismanagement" filed April 4, 1980, Docket No. 134-67-B. See also, Docket No. 134-67-C "Mill Mismanagement" filed August 14, 1980, and the prior opinion in this case, "Deed Restrictions" filed March 22, 1979.

<sup>3</sup> *Menominee Tribe of Indians v. United States*, 221 Ct. Cl. —, 607 F.2d 1335, cert. denied, March 31, 1980, — U.S. —.

<sup>4</sup> The opinion further concludes that whether or not enactment by Congress in 1973 of the Menominee Restoration Act (Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. §§ 903-903f (1976)) which repealed the Termination Act and generally restored the Menominee Tribe and reservation to trust status, constituted legislative recognition that the Termination Act was in derogation of the United States' fiduciary responsibilities to the tribe, "the Restoration Act does not grant this court any jurisdiction it would not have if the Termination Act had been left unrepealed."

Termination Act in the respects left open by the preceding discussion in this opinion; (c) claims that the Interior Department violated other statutes in its dealings with the Menominees; and (d) the specific claims set forth in note 2, *supra*, insofar as they do not rest on Congress's (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act.

On March 22, 1979, the trial judge filed the prior opinion in this case, "Deed Restrictions," it being the first opinion in the series which addressed a specific claim for money [4] judgment.<sup>5</sup> That opinion concluded that on the facts underlying this "Deed Restrictions" claim, there had been demonstrated a long-standing fiduciary duty, and a breach of that fiduciary duty by defendant, resulting in the damages summarized in the opinion; that plaintiffs were entitled, after termination, to receive their land from defendant unencumbered by burdensome deed restrictions; that until the termination procedures were completed, and while they were being planned and executed, plaintiffs were still in a fiduciary relationship to defendant and were therefore entitled to supervision and protection assuring that they would receive their property unencumbered, or its full monetary equivalent; that Interior Department officials charged with implementing the termination plan and with concurrent responsibility for protecting the Menominees as wards, recognized that the deed restrictions required by the State of Wisconsin were unfair and discriminatory, but acknowledged they would have imposed even more stringent restrictions had the State of Wisconsin not done so; that plaintiffs did not receive the federal supervision and protection they were entitled to in their negotiations with the State of Wisconsin while they were still wards of the defendant, with the result that the federal trustee transferred plaintiff's

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<sup>5</sup> See the above-cited note 2 of the court's opinion of October 17, 1979.

property to them in greatly devalued [5] form; that the federal trustee and the State of Wisconsin were motivated by the extraneous consideration of preserving the Menominee Forest for all the people of Wisconsin and of the United States, and that in similar circumstances, federal or state authorities have purchased forest land at its market value for development of a state or federal forest or park. It was concluded on those facts that defendant had breached its continuing fiduciary duty to plaintiffs, and was liable for the resultant damages.

On the alternative grounds asserted, namely, a fifth amendment taking, it was further concluded that the deed from defendant to plaintiffs denied the latter the right to take title to their forest at its full market value; that it deprived them of the full and beneficial use of their land, therefore constituting a taking without just compensation contrary to the fifth amendment; that plaintiffs' right to administer, sell or encumber its forest without statutory or deed restrictions is a property right protected by the fifth amendment, measured by comparison of before and after values; that there was no effective consent to the taking, on the facts presented, that a taking occurs upon the deprivation of a property right without the necessity of showing acquisition of an interest by the sovereign; and that there had not been a good faith effort to transfer plaintiffs' property to plaintiffs at its full value.

[6] On either of the above summarized alternative grounds, it was concluded on the basis of expert appraisal testimony that plaintiffs were entitled to recover the sum of \$29,300,000, as damages for breach of a fiduciary duty, or as compensation for a fifth amendment taking.<sup>6</sup>

Since the court's opinion of October 17, 1979 upon review of the "Basic" or background opinion, followed by a number of months the filing on March 22, 1979 of the

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<sup>6</sup> The latter grounds carrying interest.

trial judge's prior opinion in this "Deed Restrictions" claim, and since the latter refers and to some extent appears to rely upon his earlier "Basic" or background opinion when discussing the alternative ground of breach of fiduciary duty, plaintiffs moved to return this "Deed Restrictions" case to the trial judge for reconsideration in light of the court's October 17, 1979 opinion. The court ordered on June 13, 1980 that:

We think that it will facilitate review by the court of this "Deed Restrictions" case, and allow the parties to focus their contentions on issues not already decided if the trial judge now reconsiders his "Deed Restrictions" decision (findings, opinion, and conclusion) in the light of our "Basic" decision.

The opinion which follows eliminates any reference to or apparent reliance upon the enactment of the Termination Act of 1954 as a breach of trust by Congress, upon which plaintiffs can rely in obtaining monetary relief in this case under their [7] alternative theory of breach of trust. This opinion does not rest on Congress' (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act. References to the Termination Act and the circumstances prior to and following its passage, which treat with the negotiation of a termination plan, and a return by deed of their land and forest to the Indians, are retained solely to provide essential background and historical continuity in laying out the essential facts, including the continuation of the fiduciary relationship which existed between the parties during negotiations, economic pressure on plaintiffs to develop a program directed toward ultimate termination of federal trusteeship and the capacity of the Menominees to manage their own affairs during the long negotiation period.

## I. GENERAL HISTORICAL BACKGROUND

As earlier stated, this is one in a series of large and complex cases<sup>7</sup> each involving a separate claim.<sup>8</sup> [8] This particular case is predicated upon a fifth amendment taking without just compensation, and/or breach of a fiduciary duty by defendant.

An earlier case involving the Menominee Indians provides an authoritative summary of the history of the tribe and of its lands. It illustrates that they have lived "as a tribe since time immemorial in Wisconsin."<sup>9</sup> and

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<sup>7</sup> The plaintiffs are composed of the following: The Menominee Tribe of Indians, Menominee Enterprises, Inc., four named individuals: Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, and the First Wisconsin Trust Company appointed as trustee under the Menominee Assistance Trust to protect the rights of members of the tribe less than 18 years of age, *non compos mentis*, or otherwise incompetent.

<sup>8</sup> The original petition included claims bearing the following descriptions: Menominee Deed (Forest) Restrictions; Forest Management; Mill Mismanagement; Highway Rights of Way; Power Line Right of Way; Public Sewerage System; Soo-Line Right of Way (Railroad); Termination Expenses; and Mismanagement of Tribal Funds. Plaintiffs have since abandoned the claim entitled Soo-Line Right of Way and added one entitled Loss of Tax Exemption. Pursuant to request of counsel, an order was issued May 21, 1973 separating the claims into nine separate dockets as follows: Deed Restrictions No. 134-67-A; Forest Mismanagement No. 134-67-B; Mill Mismanagement No. 134-67-C; Highway Rights of Way No. 134-67-D; Termination Expenses No. 134-67-E; Loss of Tax Exemption No. 134-67-F; Power Line Rights of Way No. 134-67-G; Public Sewerage System No. 134-67-H; Mismanagement of Tribal Funds No. 134-67-I (severed for later trial).

<sup>9</sup> *Menominee Tribe of Indians v. United States*, 179 Ct. Cl. 496, 501-02, 388 F.2d 998, 1001 (1967) *aff'd* 391 U.S. 404 (1968). This decision also holds that the Menominee Tribe of Indians continued to exist as a tribal entity after the passage of the Menominee Termination Act (note 14, *infra*) and constituted a tribe, band or other identifiable group of American Indians for the purpose of suit in this court.

that they had acknowledged themselves to be under the protection of the United States as early as 1817.<sup>10</sup>

Thereafter, in a series of treaties between 1825 and 1848, the Menominees ceded their entire land holdings to the United [9] States in exchange for about 600,000 acres west of the Mississippi River.<sup>11</sup> It had been agreed in the last of these treaties that the Menominees could inspect the western land before moving to it. When they found it unsatisfactory and refused to move, they were ceded 276,480 acres of land along the upper Wolf River in northeastern Wisconsin in exchange for the 600,000 acres.<sup>12</sup> This reservation was conveyed to the Menominees "for a home, to be held as Indian lands are held. \* \* \*" It is about 95 percent forested.

The last described land<sup>13</sup> thereafter remained intact, unallotted, and wholly-owned by the tribe until conveyed by the Secretary of the Interior in 1961 to Menominee Enterprises, Inc., as later described. Conveyance was pursuant to the Menominee [10] Termination Act.<sup>14</sup> Prior to termination of federal supervision in 1961, fee

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<sup>10</sup> Treaty of St. Louis, 7 Stat. 153 (1817).

<sup>11</sup> First by the Treaties of Prairie des Chiens, 7 Stat. 272 (1825) and Butte des Morts, 7 Stat. 303 (1827), they settled certain boundary questions. Then by the Treaty of Washington, 7 Stat. 342 (1831) and 7 Stat. 405 (1832) they ceded 3 million acres to the United States. Thereafter, they ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836) and finally in 1848 by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, ceded the balance of their land consisting of approximately 4 million acres. This last cession was in exchange for the approximately 600,000 acres west of the Mississippi referred to in the text.

<sup>12</sup> The exchange was legalized by the Treaty of Wolf River, 10 Stat. 1064-65 (1854), amending the 1848 Treaty of Lake Pow-aw-hay-kon-nay.

<sup>13</sup> Except for about 46,000 acres ceded by the Menominees in 1856, 11 Stat. 679, for use by the New York Indians.

<sup>14</sup> 25 U.S.C. §§ 891-902.



title to the Menominee Reservation had been held by the United States in trust for the benefit of the Menominees, whose affairs and properties were managed in the manner typical of fiduciary relationships.

## II. MENOMINEE TERMINATION ACT

In 1947 an unrelated investigation was initiated by the Senate Commerce Committee on Civil Service to consider how the personnel and expenses of the Indian office could be reduced. It was in the course of that investigation that the Acting Commissioner of Indian Affairs presented a program designed to achieve gradual withdrawal of federal control and supervision over Indian affairs by his office. Taking such factors into consideration as a tribe's degree of acculturation,<sup>15</sup> economic conditioning, willingness to dispense with federal aid, and the willingness and ability of the state within which the tribe was located to assume certain responsibilities, the Acting Commissioner proposed the early cessation of federal supervision over 10 tribes. [11] The Menominee was one of those tribes. Unrebutted expert testimony presented by plaintiffs at trial established that the Menominee Tribe did not meet any of the criteria for termination proposed by the Acting Commissioner of Indian Affairs.

Although a bill was introduced later in 1947 to terminate federal responsibility over the Menominee Reservation, it failed of passage on that occasion and it was not until some years later that termination again became an issue in Congress.<sup>16</sup> About 15 years earlier, the Menomi-

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<sup>15</sup> Acculturation is defined in *Webster's New Collegiate Dictionary* (1961 ed.) as: "The process of absorbing new cultural traits, especially by transference from another group or people." Acting Commissioner Zimmerman considered the "acculturation" test to include such factors as admixture of white blood, percentage of illiteracy, business ability, acceptance of white institutions, and acceptance of the Indians by whites in the community.

<sup>16</sup> On August 1, 1953, H. Con. Res. 108, 67 Stat. 3132 declared "termination" to be Government policy "at the earliest possible

nees had obtained a judgment in their favor in the amount of \$8,500,000.<sup>17</sup> Per capita distribution of the award (or even part of the award) was frustrated by the jurisdictional act under which the claims had been brought.<sup>18</sup> Individual members of the tribe urgently needed and wanted their individual shares, and as a result the tribe sought congressional authorization for a per capita payment to[12] each member. The Department of the Interior declined to recommend passage of any per capita bill until a comprehensive termination plan had been completed.<sup>19</sup> As a consequence of a clear indication from Indian Bureau officials that Congress was seriously moving towards the complete elimination of the Indian Bureau, coupled with the inability of the tribe to secure a per capita payment without a completed and comprehensive termination plan, the members were under strong and immediate economic pressure to develop a program directed toward termination of federal trusteeship. In January 1953, the General Council of the Menominees adopted a resolution asking the Federal Government to authorize the transfer to the tribe of supervision of various matters then under Government control. A month later, then Congressman Melvin A. Laird introduced H.R. 2828, which authorized a per capita payment of \$1,500 to the Menominees. The bill passed the House,

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time." The Menominees were listed among the Indians covered by the resolution. It was declared to be the sense of Congress that all offices of the Bureau of Indian Affairs, the primary purpose of which was to serve any Indians free from federal supervision, should be abolished. The Secretary of the Interior was admonished to report not later than January 1, 1954 "his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution."

<sup>17</sup> *Menominee Tribe v. United States*, 119 Ct. Cl. 832 (1951).

<sup>18</sup> Section 7 of the Act of September 3, 1935, 49 Stat. 1085.

<sup>19</sup> H.R. 7104 and S. 2969, providing for a \$1,000 per capita payment had been introduced in Congress, but they failed to pass.

but was delayed in the Indian Subcommittee of the Senate Committee on Interior and Insular Affairs by its chairman, Senator Arthur V. Watkins, pending a commitment from the tribe that it would agree to complete withdrawal of federal supervision.

Congressman Laird's proposal for a \$1,500 per capita payment was eventually converted into the Menominee Termination Act. The [13] bill was characterized as one for "Removal of Restrictions Over Indian Property or Person." As later illustrated, this "Deed Restrictions" claim is predicated on the reimposition in the course of negotiations of restrictions on plaintiffs' property, but under Statute of Wisconsin, rather than federal supervision.

The record shows that plaintiffs were coerced and influenced by defendant's representatives to accept termination of federal supervision. The \$1,500 per capita payment, already approved by the House, was interwoven with termination to such an extent that in order for the individual members to receive a payment from their own tribal funds, they had to agree to accept termination. It was made clear that tribal members would be denied the \$1,500 per capita distribution unless they agreed to full and unqualified elimination of federal protection, services and privileges, and took their place in the Wisconsin state governmental system on a full and equal basis with non-Indians.

When the Menominee men and woman present at a council meeting of June 20, 1953 voted 169 to 5 (in a standing vote) to accept the principle of termination, no plan of any kind nor any specifications for termination had been presented to them, nor had they been advised of the many personal, economic and political consequences which would flow from termination. It had been made clear, however, that the \$1,500 per capita distribution [14] which they needed and wanted was inextricably linked to termination and that a vote against

termination constituted a vote against the per capita distribution.

Notwithstanding the vote in favor of that resolution, it cannot be regarded as an indication that the plaintiffs favored termination or were thereafter waving federal protection in negotiating and working out their future economic and political destiny. On the contrary, the record indicates that the vote was simply a product of the tribal members' urgent need and desire for the per capita payment. The debate which took place prior to the vote illustrates that members were convinced that they could obtain approval of the per capita payment only by voting in favor of the resolution. Thereafter on July 15, 1953, the Senate Committee on Interior and Insular Affairs amended the Laird bill by changing the main thrust of the bill from one authorizing a per capita distribution, to one providing "for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."<sup>20</sup> The \$1,500 per capita distribution which had been the tribe's initial and sole interest, was included incidentally as section 6 of a termination bill.

Two days after the Senate amendment, a special meeting [15] of the Menominee Advisory Council was called. The chairman had become alarmed upon learning of all the implications of the bill and had conveyed his concern to the membership, urging all to attend. At an exceptionally well-attended meeting, the question presented was: If you favor rejection of termination now even though it means that you will *not* receive a per capita payment from the tribal funds, please stand. One hundred ninety-seven stood, and none opposed rejection of termination.<sup>21</sup> The amended bill passed the Senate on July

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<sup>20</sup> S. Rep. No. 590, 83d Cong., 1st Sess. (1953).

<sup>21</sup> At a meeting of the Advisory Council only members of the council can register an official vote, although tribal members in attendance may be asked to register their vote so that the council can be aware of their opinion, and be guided accordingly.

24, 1953. This was the bill (with a modification of the time schedule for final withdrawal of federal services) which was eventually enacted as the Menominee Termination Act.<sup>22</sup>

As pertinent to this case, the Act authorized the tribe to retain at its own expense (under contracts approved by the Secretary) the services of management specialists to assist in studies, recommendations and reports to carry out the terms of the Act, by December 31, 1957; required the tribe to prepare a plan for future control of tribal property and service functions on the reservation; declared that (unless an earlier date was agreed upon) the responsibility of the United States on the [16] reservation would terminate December 31, 1958; provided for transfer on that date to the tribe of all property theretofore held by the Government in trust for the tribe; exempted the initial distribution from federal and state income taxes; provided that with the transfer of tribal property, all federal services would cease and all federal laws affecting Indians would cease to be applicable to the Menominees who would thereafter be subject to state laws.

Subsequently, the Act was amended on four separate occasions, first to authorize reimbursement to the tribe for funds expended for management specialists, tax consultants and others retained to assist in carrying out the purposes of the Act;<sup>23</sup> then to require a final tribal plan to be formulated and submitted for approval by December 31, 1957, said plan to provide for protection of the forest on a sustained yield basis, and assure protection of the water, soil and wildlife;<sup>24</sup> then to postpone the date

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<sup>22</sup> Public Law No. 83-399, June 17, 1954; *see* note 14, *supra*.

<sup>23</sup> Act of July 14, 1956, 70 Stat. 544.

<sup>24</sup> *Id.*, 70 Stat. 549. The Act stated in this regard:

"The sustained yield management requirement contained in this Act \* \* \* shall not be construed by any court to impose a financial liability on the United States." The intent of the quoted sentence is an issue in this "Deed Restrictions" case, and is later discussed.



for submission of a tribal plan from December 31, 1957 to February 1, 1959, and the final termination date from December 31, 1958 to December 31, 1960, and to provide [17] further that upon failure to submit a tribal plan by February 1, 1959, the Secretary of the Interior could cause such a plan to be prepared, and authorizing him to transfer tribal property to a trustee of his choice for "management or disposition" for the benefit of the tribe;<sup>25</sup> and finally to extend the termination date to April 30, 1961, provided that the Secretary was required to transfer tribal property to a trustee of his choice on March 1, 1961 if a tribal corporation was not functioning by that date.<sup>26</sup>

As required by Section 7 of the Act, the Menominee Tribe had submitted its plan to the Secretary of the Interior on January 26, 1959, contingent upon requisite action by the Wisconsin State Legislature. State action was required because one of the features of the plan could be implemented only by state legislation, namely, the creation of Menominee County, Wisconsin, out of the Menominee Reservation. Under the plan, the Menominee Reservation was to become both Menominee County and the Town of Menominee within the State of Wisconsin, with some town and [18] county officials serving in the same capacity for both governmental entities. Menominee County was to be attached to adjacent Shawano County for judicial functions, and to the office and functions of Shawano's Superintendent of Schools. The plan submitted was fi-

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<sup>25</sup> Act of July 2, 1958, 72 Stat. 290. This amendment also appropriated a sum to reimburse the tribe in part for its expenditures in carrying out the purposes of the Act, and for half such expenditures (not exceeding \$275,000) thereafter.

<sup>26</sup> Act of September 8, 1960, 74 Stat. 867. Actual termination of federal supervision was accomplished by Proclamation of the Secretary of the Interior on April 29, 1961.



nally approved some 2 years later, and on April 29, 1961, it was published in the *Federal Register*.<sup>27</sup>

A Wisconsin corporation, Menominee Enterprises, Inc. (MEI) was incorporated under state laws to accept title to and manage all property and assets of the Menominee Tribe, the stock of MEI to be held and managed by a voting trust for the benefit of all stockholders issued voting trust certificates. A trust certificate representing 100 shares of stock was issued to each of the 3,270 enrolled Menominees,<sup>28</sup> except that certificates of minors and/or incompetents were issued to the First Wisconsin Trust Company (one of the plaintiffs herein) to be held for their benefit. Each enrolled member was also to be given a \$3,000 income bond which could be used for the purchase of a homestead or farm property from MEI. The bonds could not be sold for a 3-year period, and at the end of that time MEI had an option [19] to meet *bona fide* offers. MEI was governed by its board of directors, consisting of nine members, at least four of whom were to be members of the Menominee Tribe.

On April 26, 1961, the Secretary of the Interior transferred to MEI, title to all real property theretofore held in trust by the Government for the Menominees. As earlier indicated, one of the amendments to the Act<sup>29</sup> had mandated a plan providing in general terms for sustained yield management of the tribal forest. A corresponding and specific state statute conditioned a special method of taxation of these forest lands upon a specific sustained yield restriction to be imposed by federal law. The deed transferring the Menominee Forest lands to MEI con-

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<sup>27</sup> The difficulties encountered and conditions imposed in working out the plan with the requisite state approval, are detailed later in this opinion.

<sup>28</sup> As shown on the final membership roll, approved and published in the *Federal Register* pursuant to Section 3 of the Act.

<sup>29</sup> See note 24, *supra*.

tained the following restrictive language, which is at the heart of this case:

\* \* \* THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:

1. That the lands conveyed hereby shall be operated on a sustained yield basis until released therefrom under the laws of Wisconsin or by act of Congress.

At the insistence of the State of Wisconsin and entirely apart from any requirement of the Termination Act, the deed also contained the following additional restriction:

[20] 2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

### III. CAPACITY OF THE MENOMINEES TO MANAGE THEIR OWN AFFAIRS, AND ABSENCE OF MEASURES TAKEN TO PREPARE THEM

The failure of defendant to continue to serve in a fiduciary capacity during the long period following enactment of the Termination Act in 1954, until the deed of their property to plaintiffs in 1961, is attacked herein as a fundamental breach of a fiduciary duty owed by defendant to plaintiffs. The State of Wisconsin was also strongly of the view that the Menominees were not capable of managing their own affairs. Shortly before the final termination deadline, Wisconsin passed a resolution which stated:

RESOLVED BY THE SENATE (the Assembly concurring), that the legislature of the State of Wisconsin requests the Congress of the United States to repeal or amend Public Law 399 \* \* \* so as to retain and continue indefinitely federal supervision \* \* \* until such time as the Menominee Indian tribe has achieved a status comparable and equal to the average citizen of its environs \* \* \*.

The entire burden of securing and evaluating studies deemed necessary for implementation of termination was placed on the [21] uncertain and inexperienced tribal members who were themselves the subjects of the proposal and of the necessary studies. Furthermore, the Act initially had required that payments for the studies would be made entirely from tribal funds, as made available by the Secretary,<sup>30</sup> and this also had an inhibiting effect on the initiation of such studies.

The scope of the problem of preparing a people for independence, after decades of dependency on the Government, was beyond the comprehension of the tribe. Working toward an effective solution required far greater expertise and knowledge than was available within the tribe itself. The Government's position throughout the termination period was that it stood ready to lend assistance whenever specific aid was requested, but this presupposed that the tribe could identify and understand the scope of its problems, and that it could formulate the necessary questions and requests for aid that it required. In practical application this also presupposed that the tribe would be able to organize a program under which planning for termination could proceed. That supposition was clearly not warranted.

As a result, the necessary studies were not even initiated until over a year following passage of the Act. Con-

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<sup>30</sup> As earlier described, amendments to the Act in 1956 and 1958 authorized partial reimbursement to tribal funds for these expenditures.

gressman Reuss, for example, was alarmed by the provision that the [22] Menominees would be (as he put it) "shoved out on an out-you-go-ready-or-not basis" whether or not an acceptable plan could be devised during the 4 years allotted for an after-the-fact study. The Acting Commissioner of Indian Affairs acknowledged that the Bureau had failed to explore a number of problems growing out of termination, such as hunting and fishing rights, status of the tribal court, stumpage payments, and the fate of tribal enterprises such as the hospital, welfare payments and conduct of the schools.

All cognizant officials at the federal and state levels were aware of these problems, and the Indian Bureau had compiled substantial relevant data over the years, but these data and assistance from the Bureau were not forthcoming during the termination period because Bureau functions were contracting during the same period.<sup>31</sup> As a result, studies were left to the Menominees, or to the State of Wisconsin, which had conflicting interests at many points. The Menominees had for the preceding century been closely supervised, directed and controlled by the Bureau, and were trained to dependency. The local program officer for the Bureau observed that the Menominees reacted with [23] uncharacteristic "anxiety" and with "bewilderment, irritation and conflict." His prepared analysis concluded that more than "administrative skill" was required, namely, "people expertly trained in the field of social science" conducting "sound social studies." There can be no doubt that defendant's representatives were aware of the need for in-depth studies, but the Commissioner of Indian Affairs rejected this advice on the grounds that funds for such research had already been obligated, and that necessary training of the Menom-

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<sup>31</sup> Six months after the Act was passed, the Bureau cut its local staff by over 50 percent. The Bureau immediately began to transfer its functions to the Menominee Indian Advisory Council.

inees could be accomplished by an "adult education program."<sup>32</sup>

In 1955, the Wisconsin legislature created the Menominee Indian Study Committee (MISC) in recognition of the need for decisions on the social, civil and local governmental needs of the Menominees. It was created in response to a request for help by the Menominee Advisory Council directed to the state and the University of Wisconsin. Because MISC was not created nor organized to act until a year or two after passage of the Act, its research was concerned solely toward what to do about [24] termination as an accomplished fact. MISC's membership of 14, consisted of three Menominees, representatives of each of the two counties within which the reservation was contained, six members representing the Wisconsin departments concerned with taxation, public welfare, public instruction, highways and conservation, one state senator, two assemblymen, and the state attorney general. Its studies of transition problems were in part financed by tribal funds. Its responsibility was to develop state legislative proposals.

The state legislature did eventually adopt a series of statutes creating a Menominee County coterminous with the reservation and transferring the tribe and its activities from federal to state auspices. The new laws were to become effective on the date of publication of an acceptable termination plan, but only if that plan contained certain deed restrictions.

Being a state committee, MISC was clearly state-oriented. As a result, the committee members examined

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<sup>32</sup> The "adult education program" did not serve its purpose because the majority of the Menominees had insufficient experience, training, and understanding to absorb the material offered, and dropped out of class. The Government had long established an anthropological division in the Bureau of Indian Affairs and was aware of the uselessness of applied anthropology in bridging cultural shock. Anthropologists had testified on the dangers and difficulties attendant upon a policy of termination of federal trusteeship over Indians.



the Menominee problems within the confines of their customary governmental operations. The Menominees constituted less than 1 percent of Wisconsin's population and were not regarded as holding any special rights by reason of treaty provisions or trust status as they did under federal supervision. As a result, MISC tended to ignore the human and social problems of termination in favor of pragmatic [25] "housekeeping" considerations, with the state's interests uppermost in mind.<sup>33</sup>

On advice from the State University Advisory Committee, the Menominee Advisory Council organized its own special study group called the Coordinating and Negotiating Committee. That group eventually submitted a tribal plan which was then reviewed by MISC.<sup>34</sup> There was an abdication of federal responsibility in negotiating with state authorities and in preparing the Menominees for the manifold problems of termination which had been thrust upon them. The wards in this protective trust relationship were in practical effect left to their own devices. Instead of increasing assistance during a difficult transition period, the Indian Bureau began to withdraw the services it had traditionally provided prior to passage of the Act.<sup>35</sup>

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<sup>33</sup> The Chairman of the University of Wisconsin Advisory Committee stated that "[t]he job of the Menominee Indian Study Committee was to keep the heat on the Tribe to come to their own decision." Yet these were decisions which the professionals themselves deemed extraordinarily complex. As MISC subsequently reported: "Failure to evolve a satisfactory plan (for termination of the Menominee Tribe) would result in disaster as to the best interests of the State of Wisconsin."

<sup>34</sup> Spokesmen for the university and state committees explained that: "The omnibus plan is large and complex \* \* \* the issues and problems many. \* \* \* We must frankly confess to have done little better than to have skimmed the surface on these problems."

<sup>35</sup> Dr. Verne F. Ray, anthropologist and ethnohistorian, and plaintiffs' principal witness concluded: "Had the United States properly carried out its obligation, as initiator of the idea of termination and



[26] By way of illustration, the Menominees were in effect left in the middle between federal and state governments, neither of which was prepared nor disposed to treat with the problems of implementing termination. At a time when they were still under federal supervision and protection (July 16, 1959) the Secretary of the Interior sent them the following telegram:

Reurtel July 9 concerning state legislative proposal for thirty year restrictive covenant on sale Menominee Forest property, we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens. In answer your specific query does Secretary have right to do this, we believe we can but would do so reluctantly only because you appeal that it is only way Menominees can get state legislation they want. Also it is in \* \* \* accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale covenant in the deed provided Menominees give their consent \* \* \*.

Because of a widespread awareness of the foregoing circumstances, there was general agreement among federal and state officials and concerned social scientists that the Menominees were in fact socially, culturally, economically and politically unprepared for termination as scheduled. This was reflected in [27] unsuccessful efforts to repeal the Termination Act during the 7-year period between its enactment, and the date when federal management, supervision and control were ended. Congressmen Laird and Reuss and state senators Trinke and LaFave publicly expressed their opposition to termination. In

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as trustee for the tribe, its far greater competence in research and analysis would undoubtedly have resulted in complete abandonment of the termination project.

adjoining Shawano County, officials directed the following resolution to Congress:

\* \* \* WHEREAS, the State of Wisconsin, Shawano and Oconto Counties were not considered by the Congress in the passage of Public Law 399 [the termination bill] and only one hundred fifty Menominee Indians from a tribe of over three thousand attended the meeting of the tribal council which considered the acceptance of the terms of Public Law 399,

BE IT RESOLVED \* \* \* that [the senators and Congressman addressed] \* \* \* be requested \* \*

1. To introduce immediate legislation to repeal Public Law 399 in its entirety.

Social science witnesses pointed out the inconsistencies in defendant's position, namely, that the Menominees were ready to exercise the rights and responsibilities of other American citizens in governmental matters, but thereafter were to be closely circumscribed in the management of their own valuable forest, as if they were still wards incapable of exercising those rights and responsibilities. They felt that the Menominees were far from being fully acculturated in many of the spheres most critical to successful entry on an unlimited and unrestricted [28] basis into the world of Wisconsin whites. During a long period of reservation life they had developed a special system of values and expectations. Not having been accustomed nor permitted to make decisions of their own, they had grown to expect a wide variety of services without charge. There were things more important to the Menominees than money, and there was a general apathy toward tribal government. The individual standard of living was low, and there were no local business leaders. The Menominees did not possess the skills and experience necessary to run the timber operation and a local government. Nothing during the preceding century had prepared them for modern politics.

The Menominees were totally unprepared for an allotment of tribal lands to individuals and families. They had rejected the policy enunciated by the Allotment Act of 1887 which contemplated that with the assignment of individual homesites, the Indians would turn to agricultural pursuits and tribal bonds would be weakened. Thus they had gained no experience over the years in the handling of land as a private possession, and they equated allotment with "losing" their community land. This characteristic had not been taken into consideration in selecting tribes suitable for termination. Communal ownership had been an essential and traditional cultural value of the Menominees. [29] Each individual had use rights in all tribal property, and held no piece of paper evidencing ownership of a particular parcel. After termination, each individual was required to purchase a parcel from MEI in order to have title to it and to his home. The reaction was suspicion and distrust of the termination proposal and of the tribal leaders in their efforts to work out a termination plan.

Problems growing out of a lack of formal education outside the reservation as well as language problems also confronted the Menominees as they approached termination. Some Menominees in middle age had to have termination explained through interpreters. Although Menominee children were then progressing as high as the eighth grade before discontinuing their studies, the older tribal leaders charged with decision-making had not even reached that modest level of schooling. Upon leaving school a Menominee still knew little about typical non-reservation life in Wisconsin, and almost nothing about business. Their sawmill had been run by white employees of the Indian Bureau, paid by the Menominees, and they had been excluded from the better paying managerial, supervisory and skilled positions in their own enterprise. It was clear that the Menominees were in no position to work out their own post-termination political and eco-

conomic problems during the long termination period following passage of the Act.<sup>36</sup>

[30] As stated in section IV of the court's opinion of October 17, 1979,<sup>37</sup> Congress enacted the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. §§ 903-903f which repealed the Termination Act and restored the Menominees to trust status. The Restoration Act and its legislative history contain substantial material reflecting adversely on the passage of the Termination Act. This material does not, as the court finds, constitute support for a conclusion that Congress' prior enactment of the Termination Act constituted a breach of trust. But the material together with other evidence of record does lend substantial support to the conclusion that the Menominees were not prepared to dispense with their long-time federal guardian and to be on their own during the 7-year period of negotiations with the State of Wisconsin, and to work out the terms and conditions of the return to them of their property.<sup>38</sup>

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<sup>36</sup> Other cultural and economic shocks awaited the Menominees after termination. The reservation system had bred distrust and poor relationships between the Menominees and non-Indian residents in adjacent counties. Termination resulted in a loss to the Menominees of their local doctor and hospital. The Governor's Commission on Human Rights reported that less than 5 percent of the tribal children had adequate diets, and the number of Menominees receiving some public assistance was six times the state average.

<sup>37</sup> Note 3, *supra*.

<sup>38</sup> Prior to enactment of the Menominee Restoration Act the President had, on July 8, 1970, urged repudiation of House concurrent Resolution 108 (August 1953) to the effect that termination was the long range goal of the Congress. The President stated that the policy was wrong and based on false premises. He explained:

"Termination implies that the Federal Government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can there-

[31] The deterioration in the condition of the Menominees following termination is further evidence of their lack of capacity to work out their own destiny during the period preceding the effective date of termination.

When the Act was passed, the Menominees had a balance in the U.S. Treasury of \$9,960,895.<sup>39</sup> Shortly thereafter the \$1,500 per capita distribution reduced that balance by \$4,905,000. It was further reduced by \$2,268,240 in September 1955 to correct [32] improper computation of per capita payments made to reflect the fair market value of timber previously cut from the reservation, commencing back in 1941. The Department of the Interior reported on February 24, 1956 that in less than a year's time, the Menominee balance had shrunk to \$2,150,000. The report further indicated that cash receipts during the preceding year had not covered tribal obligations and

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fore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government.

"Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

"This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immoral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship of any other American."

<sup>39</sup> This cash balance had been one of the primary factors in selecting the Menominees for termination.



it concluded that federal funds were required for roads, schools and adult education.

Right after termination, the Menominees lost their hospital because it failed to meet state standards. On July 26, 1960, just prior to termination, the Menominee General Council passed a resolution addressed to the Secretary of the Interior, charging negligence in connection with a recent remodeling of the hospital at a cost to the tribe of \$250-\$350,000. Ten violations of the state building code were cited. But on May 11, 1961, the Acting Commissioner of Indian Affairs rejected the resolution on the grounds that it had not been the intent of the Menominees, when they were still wards of the defendant, that the remodeling undertaken by the Bureau comply with state requirements. Compliance would have been too expensive, it was stated.

Conditions continued to deteriorate. In January 1965, the Menominees summarized for MISC, developments in the 4 years following termination. The report cited an inadequate tax base; [33] the high cost of tubercular incidence; the high ratio of welfare and correction costs to income; lack of adequate job training; and school dropouts and delinquency. Property tax bills and bond interest were regularly exceeding earnings from the mill. Efforts to bring new industry into Menominee County had failed because the already high property taxes were increasing, and because local labor was inadequately trained and local support facilities were lacking.<sup>40</sup>

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<sup>40</sup> In March 1965, Senator Proxmire reported to the Senate "that the consequences [of termination] for this Wisconsin tribe have been very bad, in spite of the fact that the state of Wisconsin and its university has tried to help the Menominees. The Menominees have suffered greatly. They are poor. Many are unemployed. The health of these Indians has suffered seriously." He added "This is a Nation which at one time controlled a large portion of Wisconsin, and with which we made a treaty under which one small primeval area of Wisconsin was to remain as their territory." De-



In a report in 1965 the Indian Bureau joined with the Governor of Wisconsin and its senators in reporting this deteriorating condition and the Bureau stated to the House Appropriations Committee that termination had been "ill advised."<sup>41</sup> Governor Gaylord Nelson appealed for financial [34] aid to the Chairman of the Senate Subcommittee on Indian Affairs, noting that:

The present economic problems on the reservation resulting from the health, education and welfare problems are a consequence of the pre-termination situation. As Attorney General John W. Reynolds pointed out in his testimony before the Senate Subcommittee on Indian Affairs, one cannot take people out of an institution in which they and their forefathers have lived all of their lives and then claim that the operator of the institution has no responsibility for what happens to them thereafter.

The new management at MEI had inherited a 50-year-old plant, without needed improvements. At the same time, it had assumed responsibility for providing all governmental services in the face of exhausted capital reserves required for investment. The individual Menominee was surprised to find that he was now required to pay market value for the individual parcel of land he occupied, but was without the cash to buy it, with the result that individual MEI income bonds were being surrendered in lieu of cash. MEI was essentially controlled by non-Indians, and as it struggled for survival it initi-

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claring that "this proud tribe is gradually and painfully disintegrating," the Senator drew attention to the fact that the average Menominee family of five subsisted on an annual income of \$2,300; one out of seven was on welfare; and a third were subsisting on federal food surplus distributions.

<sup>41</sup> The BIA report concludes that Menominee County was the smallest and poorest in Wisconsin and that Menominee County had become a "pocket of poverty" following the termination of federal services and supervision.

ated management policies which the Indians found it difficult to accept. As a result, severe tensions developed between the tribe and its own representatives in MEI.<sup>42</sup>

[35] Individual Menominees had no prior experience in paying for taxes, health care, utilities and other services formerly provided by the community. As a result, some families suffered a discontinuance of water and electrical services, and some were in danger of losing their homes. Many were surprised and outraged when the state ruled in 1962 that game laws were to be enforced in Menominee County. Menominee treaty rights were eventually confirmed, but only after litigation carried to the U.S. Supreme Court.

As a prelude to detailed discussion of the facts bearing on this "Deed Restrictions" claim it is concluded that a unique relationship between the Government and the Indians has long been judicially recognized.<sup>43</sup> That relationship has been compared to that of guardian to ward, or trustee to *cestui que trust*. While that relationship exists, the conduct of U.S. representatives has always been judged by the most exacting fiduciary standards. The fiduciary duty assumed by the Government imposes upon it the obligation to act at all times with the Indians' best interests uppermost in mind, and to exercise prudence and good faith in the control and management of Indian property within its trust.<sup>44</sup> The duty of care owed is es-

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<sup>42</sup> For example, when MEI decided to dispose of the Menominee electric plant to Wisconsin Power and Light, tribal members unsuccessfully sought an injunction to halt the sale.

<sup>43</sup> *United States v. Kagama*, 118 U.S. 375, 383-85 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831); *Arenas v. United States*, 60 F. Supp. 411, 419-20 (S.D. Cal., 1945).

<sup>44</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937); *Oneida Tribe of Wisconsin v. United States*, 165 Ct. Cl. 487, 492-94, cert. den., 379 U.S. 946 (1964); *Seneca Nation v. United States*, 173 Ct. Cl. 917, 925 (1965); *Menominee Tribe v. United States*,

pecially high when the [36] Government-trustee has itself developed an interest related to the management of Indian property.<sup>45</sup>

In this case a specific trust relationship had long existed between plaintiffs and defendant.<sup>46</sup> That trust relationship continued beyond Congress' enactment of the Termination Act in 1954 and until such time as termination became effective under the terms of the Act as amended.<sup>47</sup> During the termination transition period between passage of the Act and its effective date, defendant made little effort to negotiate solutions to the many problems confronting plaintiffs as a result of the forthcoming termination of federal supervision. On the contrary, defendant gave consideration and effect to its own interests and to the interests of the state where state interests were in conflict with the best interests of plaintiffs.

[37] It is concluded that these circumstances, as they bear upon this "Deed Restrictions" claim constituted an abrogation of defendant's fiduciary obligations growing out of its treaty and trust relationship to plaintiffs, and that defendant's acts and omissions constitute a breach of the fiduciary duty owed to plaintiffs.

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101 Ct. Cl. 22 (1944); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944); *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C., 1972).

<sup>45</sup> *Navajo Tribe v. United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966). Also see & cf. *Squire v. Capoeman*, 351 U.S. 1, 8 (1956). Note that the Government initiated termination as a means of curtailing offices of its Indian Bureau; and that it maintained a continuing interest in preserving the Menominee Forest (as a forest) for public purposes after termination.

<sup>46</sup> See treaties cited at notes 10-12, *supra*, and *Menominee Tribe v. United States*, 101 Ct. Cl. 10 at 19-21.

<sup>47</sup> See 10 BOGERT, TRUSTS AND TRUSTEES, § 1010 (2d ed. 1962) at 574. See also, *Id.* § 1001-02 at 493 and 502.

#### IV. HISTORY AND BACKGROUND OF THIS "DEED RESTRICTIONS" CLAIM

In brief introduction to this specific claim, it is significant that when defendant originally took title to plaintiffs' property and thereafter held it as trustee, the tribal property was unencumbered and fully alienable. Upon return of their property to plaintiffs on the effective date of termination, the deed of conveyance from defendant contained restrictions on its use, conveyance and encumbrance which, it is herein alleged, sharply reduced its market value.

As earlier noted, Section 7 of the Termination Act required the Menominees to prepare a plan for future control of tribal property and service functions on the reservation. One of the amendments of the Act, the so-called Reuss amendment, initiated primarily to eliminate the termination deadline, and to substitute an indefinite period within which the Menominees, the State of Wisconsin, and the U.S. Government were to reach agreement [38] on a plan for future control of tribal property, failed to accomplish that objective.

Congressman Reuss perceived what he regarded as two major defects in the Termination Act. He considered the Act in violation of the treaties which had reserved about 234,000 acres to the Menominees "for a home, to be held as Indian lands are held," in exchange for the many millions of acres which they had ceded to defendant pursuant to those treaties. It was Congressman Reuss' opinion that the quoted phrase forever exempted the Menominee Reservation from state taxation. However, since termination would subject the Menominees to state taxation, he believed the Act to be in violation of the treaties. Moreover, he had concluded that the amount of taxation to be imposed (\$800,000 annually by his prediction) would be immediately fatal to the tribe's continued economic ex-

istence, forcing it to overcut the forest or to sell it outright to generate essential revenue for basic needs.<sup>48</sup> There is also little doubt that he and others were deeply interested in preserving the forest for another reason, namely, its aesthetic value to all of the people of Wisconsin and of the United States.

[39] Other factors also contributed to the ultimate imposition of restrictions on the tribal property as a condition to its conveyance to the tribe. The Menominees had not been strangers to some form of forest management. The LaFollette Act of 1908 had been enacted to protect their forest from liquidation and depredation such as that historically suffered by other tribes. But their primary interest was directed to the feature of the Reuss amendment which would have eliminated a termination deadline, the provision eventually eliminated from the amendment when it was enacted.

Further pressure on the Menominees to accede to a sustained yield requirement flowed from the fact that they could not obtain their own county from the State of Wisconsin following inevitable termination, unless they first agreed to the restrictions. Moreover, the Reuss amendment proposed that the costs of specialists to study termination problems would be paid from federal rather than tribal funds, a form of financial assistance needed by, and advantageous to, the tribe. The amendment also authorized the Secretary to transfer to the tribe title to any buildings and road equipment located on the reservation, thus confirming the tribe's title to those assets.

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<sup>48</sup> He testified in support of his amendment that the entire profits of the tribe's logging and sawmill operations had averaged only \$400,000 annually and this had been used to defray special expenses including mission schools, clinics, hospitals and welfare services, thus leaving little for payment of taxes. He added: "This process of economic deterioration would no doubt be hastened by demands of individual members of the tribe for a cash allotment, to enable them to leave the sinking ship."



For all the foregoing reasons, the tribe consented to the Reuss amendment containing a general proviso that any plan submitted to the Secretary for approval "must contain provision [40] for protection of the forest on a sustained yield basis, and assure protection of the water, soil and wildlife."

There was an obvious conflict of interest between the State of Wisconsin and plaintiffs on the issue of whether or not restrictions should be placed on plaintiffs' use of their own property following termination of federal supervision and protection, and on the further issue of the extent of those restrictions. The state had a strong interest in preserving the unique Menominee Forest for its aesthetic value to everyone. Plaintiffs, on the other hand, while dedicated to preserving the forest for their own independent reasons, were also necessarily concerned with economic survival. They were about to be compelled by termination to utilize the forest for its highest economic return, consistent with good commercial management. *Flexibility* in management was the key to economic well-being as it would be in the case of any comparable commercial enterprise. Instead, the conveyance of their own property to the Menominees was circumscribed with rigid restrictions.

One of the key issues in this case, insofar as it rests on breach of a fiduciary relationship, is whether or not plaintiffs were entitled to a continuation of defendant's protection under the trust relationship which had prevailed since 1817, while the proceedings and negotiations designed to terminate [41] federal supervision and protection were going on. It is concluded that plaintiffs were entitled to, but did not receive, the continuing protection contemplated by that long-standing trust relationship.

Despite its strong opinions against inflexible restrictions, the Department of the Interior did not regard it as part of its trust responsibility to protect and assist the plaintiffs in the course of their negotiations with the state



and in procuring the best possible arrangement for the Menominees, in their best economic interests. The Wisconsin legislature refused to enact legislation necessary to permit the Menominees to organize as a county within the state, unless they would accept *a state-regulated* sustained yield restriction and *also* accept a restrictive covenant forbidding sale or mortgage of tribal property, absent state consent, for 30 years.

In short, on defendant's initiative and with its approval, the State of Wisconsin, as a prerequisite to its essential cooperation, insisted on a statutory and inflexible sustained yield requirement in order to assure preservation of the Menominee Forest as an aesthetic asset and to fulfill what was described as a "congressional guideline" in the Termination Act. In addition, the state insisted on the 30-year covenant against alienation or encumbrance.<sup>40</sup> Although it characterized the [42] sustained yield restriction as discretionary, defendant acknowledges that the Secretary of Interior would in any event have required such a restriction had the state not done so. Both restrictive covenants imposed were enforceable by an injunction brought in its own name by the state, and the covenants in the deed of tribal property from defendant to plaintiffs were specifically recited as being "for the benefit of the State of Wisconsin."<sup>50</sup> (Emphasis supplied).

The Menominee Indian Study Committee (MISC) established by the Wisconsin legislature as earlier described, was essentially state-oriented and strongly influenced to preserve the Menominee Reservation as a scenic resource. It was the principal source of state legislature recommendations on transfer of jurisdiction over the Menominees and their property from defendant to the State of Wisconsin, and state representatives had been primarily

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<sup>40</sup> The state had originally demanded a restrictive period much longer than 30 years.

<sup>50</sup> See text following note 29, *supra*.

interested in preservation of the Menominee Forest as a national or state park.

It was also vital to the Menominees, who were about to be subjected to state taxation for the first time, to insure that any tax system imposed would not be economically destructive. MISC was aware that the Menominee Forest would have to bear the full brunt of taxes collected to support public services to [43] the Menominees people, and that taxing the forest at its full appraised value would be financially disastrous. An apparent alternative existed in the Wisconsin Forest Crop Law which authorized taxation of the forest itself at a nominal rate, adding an assessment for the timber actually harvested. A forest taxed under this law was subject to certain conditions. It had to be operated under a sustained yield plan and opened to the public for recreational use. Furthermore, the taxpayer was bound to that arrangement for 50 years, and upon any earlier withdrawal was obligated to pay the difference between taxes actually paid and the amount payable under full assessment for each year the forest had been operating under the Forest Crop Law.

That alternative was unsatisfactory to the Menominees for three reasons. The Wisconsin Forest Crop Law would not produce enough revenue to pay a fair share of local government costs plus all public school costs. It was, moreover, not designed for application to the Menominee Forest, which, because of the need to liquidate excessive stocking, was ready for immediate harvest. Finally, the requirement under that law for public access to its lakes and streams would have reduced the economic value of the forest to the Menominees. State and local officials were similarly unenthusiastic about applying the Forest Crop Law [44] because it would have been so costly to administer. The state was required thereunder to appraise and reassess severance values at annual public hearings and this would have been a time-consuming and expensive procedure in the case of a forest of that size.

The state would also have to pay an annual contribution to the Town of Menominee to supplement its local budget.

It was accordingly concluded that a system of taxation would have to be developed that would be sufficiently balanced to preserve the forest from destruction just to meet tax payments, yet capable of producing sufficient tax income to support all necessary public services. The MISC devised a special tax law tailored to the above considerations. It provided for taxation of the forest at 40 percent of its appraised value. This bears on a central issue in this case, because the 40-percent figure was adopted in recognition of the fact that imposition of a statutory sustained yield requirement would reduce market value at least to that extent.<sup>51</sup>

It was in exchange for this special system of taxation, that a statutory and state-administered sustained yield restriction (binding upon future purchasers as well) plus a 30-year [45] restriction against sale and encumbrance, were imposed upon plaintiffs in the deed of their forest lands from defendant. Plaintiffs' claim herein proceeds from the expansion of the general "sustained yield" requirement set forth in the Reuss amendment into inflexible restrictions in the deed to plaintiffs of their property from defendant, as trustee, with a consequent reduction in its market value; and from failure of defendant to actively intervene in the Menominee-State of Wisconsin negotiations, on behalf of the Menominees and in their best economic interests, during which time defendant was still serving in a trust relationship to plaintiffs.

The principal factual issues at trial were the market value of the Menominee Forest on the date of termina-

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<sup>51</sup> The figure of 40 percent was also selected as the minimum which would produce required revenues. It was then necessary to apply a tax rate of twice the state average because of the unusually high welfare costs and revenue needs of Menominee County.

tion<sup>52</sup> and the effect upon that market value of the deed restrictions. Testimony of a number of experts was addressed to those issues. Plaintiffs presented a total of six expert witnesses, two of them in rebuttal. They were all exceptionally well-qualified by education and experience.

George Banzhaf and his son William H. Banzhaf are, respectively, President and Vice-President of George Banzhaf & Company. Richard C. Winslow is a forestry consultant employed by that company. George Banzhaf is an impressive and highly [46] respected forest resource consultant who has been engaged in forest management since 1924.<sup>53</sup> He has had extensive experience in the management of large forests throughout the United States and Canada and has an intimate working knowledge of the practice in the Great Lakes area. He has published numerous articles on selected forestry topics and has for a number of years conducted undergraduate and graduate seminars at the University of Michigan's School of Natural Resources.

William Banzhaf has been engaged in forest management since receipt of his degree in forestry from the University of Michigan in 1967. He has been involved in the direction and planning of most of the services performed by the company in the United States and Canada. Typical services performed consist of forest inventories; valuations and appraisals; forest resource studies and field audits; analyses of forest management and forest products; cost and marketing studies, policies and procedures; installation of continuous forest inventory systems; growth studies; public land timber policy for the U.S. Government; studies involving feasibility and location of forest resource converting facilities; interpretation of aerial photographs; and inventory and appraisal of forest land recreational opportunities.

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<sup>52</sup> April 30, 1961.

<sup>53</sup> Following a Bachelor of Science degree in forestry in 1922 from the University of Michigan.

[47] Richard C. Winslow has both a bachelor's and master's degree in forestry and has been employed by the company since 1967, gaining extensive experience in the installation of continuous forest inventories, audits and other forestry inventory systems. He has been employed as a "working circle forester" by a large corporation carrying out management policies on a block of forest land.

Also presented by plaintiffs was Wesley Rickard, a consulting forest economist involved in forest management and production. He has a bachelor's degree in forestry and a master's degree in forestry economics. Mr. Rickard has had extensive professional experience with the U.S. Forest Service and New York State forest system as well as with major wood products companies,<sup>54</sup> and he has achieved distinction in his field as an author and as an active participant in professional societies.<sup>55</sup>

[48] Defendant's expert is Stanley F. Miller, Jr., Vice-President of Real Estate Research Corporation. He was assisted in his report by Norman E. Briesemeister, Edward F. Steigerwaldt and Professor John Carow. Although the latter two are qualified in forestry, Miller and Briesemeister do not normally appraise forest land.<sup>56</sup>

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<sup>54</sup> Including service as a forest economics researcher for the U.S. Forest Service, manager of the economics department of Weyerhaeuser Co., and in forest management and operational planning for that company, Georgia-Pacific, and Pope and Talbert. He has analyzed federal and state public lands for Oregon and Washington State, and has consulted throughout the United States.

<sup>55</sup> Plaintiffs' expert witnesses on rebuttal were Dr. Duncan A. Harkin, a forest economist and Associate Professor of Agricultural Economics and Forestry at the University of Wisconsin; and Robert E. Kleiner, a forestry consultant, real estate appraiser, logging engineer, and land surveyor.

<sup>56</sup> Briesemeister's experience as a real estate appraiser, at the date of defendant's appraisal report, consisted of about 1 year in the mortgage department of an insurance agency following college graduation.



The experts addressed themselves to determination of the fair market value of the forest on the date of termination, initially disregarding the deed restrictions; then the reduction in market value by reason of each deed restriction; and finally the effect on market value of the loss of a pre-existing exemption from property taxes.

V. APPRAISALS OF FAIR MARKET VALUE OF THE  
MENOMINEE FOREST, DISREGARDING DEED  
RESTRICTIONS

*Report of George Banzhaf & Co.*

George and William Banzhaf, and Richard C. Winslow collaborated in "An Appraisal of the Menominee Forest as of April 29, 1961." That report concludes that the Menominee Forest (disregarding the deed restrictions) had a fair market [49] of \$39,893,680 on that date. The appraisal method employed was to determine the worth of the standing timber (stumpage), and the value of the underlying land, by use of transactional evidence, based on the composite judgment of willing buyers and willing sellers, reflected in actual sales of comparable stands of timber during the relevant time period.

In collecting such transactional evidence, the Banzhafs discarded general averages of stumpage unit values based on statewide price ranges in favor of stumpage unit values established by timber sales in the vicinity of the Menominee Forest, even though the local sales invoked timber inferior in quality and value to that of the Menominee's. They relied on a 1963 Continuous Forest Inventory (CFI)<sup>57</sup> to determine stumpage volume. The 1963 CFI was the only available volume figure susceptible to audit and also close in time to the date of termi-

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<sup>57</sup> A CFI consists of a light statistical sampling based on permanent sample plots arbitrarily located on a grid pattern and designed to furnish a reliable total inventory.



nation.<sup>58</sup> They nevertheless adjusted it downward to reflect certain height measurements which the Banzhafs concluded did not represent average utilization standards. Further reductions in volume [50] were made to better reflect merchantable volume.

The Banzhaf report lists these downward-adjusted 1963 inventory figures for each and every species within the Menominee Forest, together with sawtimber and cord values for each species, as established by sales from the Nicolet National Forest, slightly northwest of the Menominee property. Nicolet timber is acknowledgedly inferior in quality and value to that of the Menominee's.<sup>59</sup> Bare land value at \$12 per acre is added to stumpage value to achieve the total value of the Menominee Forest.<sup>60</sup> The Banzhafs also took into consideration the size of the forest because industry is necessarily concerned with total inventory and the assurance of a continuous supply.

The report also takes into consideration certain additional safety factors, so-called, as an alternative to discount-to-present value. For example, saplings below pulpwood size,<sup>61</sup> are assigned no value whatsoever even though established young stands will one day be harvested and therefore have potential [51] value. This is a form

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<sup>58</sup> The Banzhafs also considered a 1957 figure developed by the so-called Hartman cruise, but there was no evidence supporting that figure. It was, moreover, out of line with CFI's performed in 1960, 1963 and 1970. Data underlying the 1960 CFI was not available, but the Banzhafs were furnished reliable data underlying the 1970 CFI and were able to check it against the 1963 CFI to confirm the accuracy of the latter.

<sup>59</sup> At trial, timber sales from the Cleveland-Cliffs Iron Company Forest were also cited. They are more comparable, but it was too late to directly reflect them in the Banzhaf report.

<sup>60</sup> Bare land value is computed by the Banzhafs solely on the productivity of the soil, and the intrinsic value of land ownership.

<sup>61</sup> Less than 4 inches breast-high diameter.

of discount-to-present-value. Similarly, timber of pulpwood size is assigned only pulpwood value, although its ultimate use at maturity would be as sawtimber. The same is true of healthy pole timber with the potential of maturing into sawtimber.

Use of weighted average prices, by species, of sales by the U.S. Forest Service from the Nicolet National Forest constitutes another safety factor, since the Nicolet timber was markedly inferior. The Banzhaf report assigns no value whatever to the Menominee Forest for its extensive lakes and rivers. Other appraisals hereinafter reviewed recognize that recreational potential is a valuable attribute of any forest.

In summary, the Banzhaf appraisal of \$39,893,680 (disregarding the deed restrictions) is reasonably and conservatively constructed, and is entitled to considerable weight.<sup>62</sup>

#### *State of Wisconsin Appraisal*

Based upon a forest inventory by conventional ground cruise,<sup>63</sup> Wisconsin tax appraisers concluded the Menominee Forest had a stumpage value of \$30,361,286. Because the forest [52] was being operated on a sustained yield basis, with growth and cut theoretically in balance, the tax appraiser concluded that the 1957 volume could be used as a basis for value in 1961. The Supervisor of Assessments assigned a value per thousand board feet of sawlogs to each species, to which he added a value for pulpwood, other wood products and reproduction value, to achieve the above total figure for value of forest products.

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<sup>62</sup> George Banzhaf & Co. has appraised a number of other large forest properties throughout the United States and specifically in this Great Lakes area, including those of Cleveland-Cliffs Iron Company, Ford Motor Company and Ramer Corporation. Actual sales have subsequently confirmed two of these appraisals.

<sup>63</sup> The so-called Hartman cruise mentioned in note 58, *supra*.

The record does not show how values for the various species or constituents were determined. It is assumed that they were assigned by the assessor solely for tax purposes. Both parties to this litigation have questioned the assessed value. Plaintiffs observe that an average value of about \$32.90 per thousand board feet (MBF) has been assigned to the Menominee sawtimber by the assessor. If this average value is applied to the inventory figures adjusted from the 1963 CFI by plaintiffs' experts, the sawtimber alone would be worth \$46,533,760. That, of course, is considerably higher than the total market value of the forest in the Banzhaf report, as earlier summarized.

#### *Rickard Appraisal*

The Banzhaf appraisal was independently reviewed and tested by the aforementioned forest economist, Wesley Rickard. He concluded that the Menominee Forest had a fair market value of \$38,456,900 as of the date of termination. Mr. Rickard [53] utilized a discount-to-present-value approach rather than the safety factors employed by Banzhaf. By interpolating between the 1958 and 1963 CFIs, he independently reached a volume figure of 1,440,000 MBF. This was so close to the inventory figure actually audited by Banzhaf & Company (1,414,400) that he adopted the latter figure.<sup>64</sup>

In calculating the value of each timber species, Mr. Rickard declined to use sales from the Nicolet National Forest because of its admittedly inferior quality. He similarly rejected stumpage values developed by the Bureau of Indian Affairs (BIA), because they were not based on actual sales on the open market, but were computed by the so-called "Delaney formula," which converted rough lumber prices back to stumpage value.<sup>65</sup>

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<sup>64</sup> Defendant's experts actually estimate a higher inventory of 1,495,000 MBF, as of 1961.

<sup>65</sup> The formula had been employed by the BIA for bookkeeping purposes, in order to allocate part of the income of Menominee Mills to the mill itself, and part to the forest.

The method was of questionable accuracy and produced a Menominee stumpage value close to that illustrated by actual sales from the Nicolet National Forest which was known to be of lesser value. Instead, Mr. Rickard took the veneer and rough lumber prices and subtracted reasonable logging and milling costs to determine true stumpage values. The latter were checked against [54] the range of stumpage values documented in the Wisconsin Forest Products Price Review for 1961. They fell within the upper limits of that range. This was deemed to be a confirmation check in light of the acknowledged high quality of Menominee timber.

Using these stumpage values, Mr. Rickard determined the average value per MBF, from which he subtracted \$3.75 per MBF to cover administration and management costs, thus achieving a net weighted average value of \$43.70 per MBF for all species. He multiplied this by the inventory figure above-cited to calculate a retail stumpage value of \$61,809,000 which an investor could expect to recover over a period of years. Discounting that to present value, over a period of 10 years, deducting for capital gains tax, and 10 percent annually for tied-up investment, he computed a "present" value in 1961 of \$32,601,900. To this he added the weighted average value of cord wood<sup>66</sup> discounted to a present value of \$618,500.

Based on information provided by the supervisor of the Nicolet National Forest to the effect that bare land in that area is worth \$40-\$60 an acre,<sup>67</sup> Mr. Rickard valued the [55] 233,902 acres of Menominee land at \$50 an acre, or \$11,695,100. From this he deducted capital gains taxes and calculated a present value in 1961 of \$6,168,000.<sup>68</sup>

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<sup>66</sup> At \$2.09 per cord from Nicolet Forest sales, there being no quality differential for cord wood.

<sup>67</sup> Using a definition of bare land as land with brush and young trees below merchantable size.

<sup>68</sup> When fully discounted, Mr. Rickard's figure of \$50 per acre is reduced to \$22.39, compared to the Banzhaf figure of \$12. However,

He also deducted \$931,500 as the present value of property taxes that would have to be paid over the 10-year period of potential land sales. As in the case of the Banzhaf appraisal, Rickard assigns no recreational value to the forest by reason of its lakes and rivers.

His figure of \$38,456,900 for the fair market value of the Menominee Forest as of April 1961, bears a reasonably close relationship to the Banzhaf appraisal of \$39,893,680, even though the two appraisals were reached by substantially different routes. It is concluded that the Rickard appraisal is also reasonably and conservatively constructed, and entitled to considerable weight.<sup>69</sup>

[56]

*Defendant's Appraisal*

As earlier indicated,<sup>70</sup> defendant's report was prepared by Stanley F. Miller, Jr., assisted by Messrs. Briesemeister and Steigerwaldt and Professor Carow. It values the Menominee Forest (disregarding the deed restrictions) at \$31 or \$32 million.<sup>71</sup> The figure is reached by the market data (comparable sales) approach which is then regarded as checked and confirmed by an income capitalization approach.<sup>72</sup>

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the Banzhaf figure totally disregards the market value of sapling stands, this being one of the safety factors employed by them in lieu of discount-to-present-value.

<sup>69</sup> Dr. Duncan Harkin, also a forest economist (*see* note 55, *supra*), reviewed both the Banzhaf and Rickard appraisals, as well as those offered by defendant. It was his conclusion that the Rickard appraisal was the most valid because it developed true stumpage values based on sales of Menominee lumber, less logging and milling costs, whereas open market values employed by others failed to reflect the above-average quality of Menominee timber.

<sup>70</sup> *See* text at note 56, *supra*.

<sup>71</sup> The Miller report produces a value of \$32 million, reduced without explanation to \$31 million. At another point in the report, \$32 is again proposed.

<sup>72</sup> The income capitalization method produces a value of \$27.1 million as computed by Mr. Miller, and a value of \$32.4 million as computed by Professor Carow.



The market data approach depends, of course, upon the comparability of the other sales being analyzed. Mr. Steigerwaldt, the forestry consultant to Mr. Miller, analyzed nine sales of forest land for their possible relevance as comparable sales.<sup>73</sup> However, Mr. Miller then prepared the appraisal itself, using figures provided by Mr. Steigerwaldt, but rejecting the latter's expert opinion on comparability. For example, Mr. Miller rejected a comparison of percentage of species of [57] timber in the various parcels, with those in the Menominee Forest. The adjustment to reflect admittedly greater quantities of timber in the Menominee Forest, is an incomplete adjustment.<sup>74</sup> Even with this incomplete adjustment for quantity, Mr. Miller arrives at a comparable appraisal of \$35,503,866 for the Menominee Forest. But he then finds it subject to "further adjustment." In addition to rejecting a comparison of the specific types of timber present in the comparable, the Miller appraisal also fails to reflect differences in quality. Yet the record shows that market value varies widely with type and quality.

In other specific respects the so-called "comparable" sales fail the test of comparability. Sale "A", for example, consisted of less than 10,000 acres within a heavily dairy-farm-oriented community. Mr. Miller's forestry expert noted that the sawtimber had never been cut for forest products and therefore contained—

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<sup>73</sup> Two in Wisconsin, five in Michigan and two in Maine. The Maine sales were ultimately dismissed as useless for comparison purposes. The sales span the period 1964-68. A downward adjustment of 1966 data by about 15 percent (3 percent a year to the 1961 base) is made to reflect deviations in the cost of living index and a 1.6 percent average increase in stumpage.

<sup>74</sup> After increasing the per forested acre value of the "comparable" by a formula reflecting the proportion by which Menominee board feet per acre exceeded board feet per acre of the "comparable," the resultant value per acre is applied only to the 144,495 acres of the Menominee Forest currently in saw-timber. Acreage in pulp and pole timber, and saplings, is excluded.



a high percentage of cull and poor quality hardwood and hemlock. \* \* \* Further, comparison with the Menominee sawtimber would [58] indicate a considerable variation with stand size and quality, with Menominee forest types definitely better.<sup>[75]</sup>

Despite this comment by his forestry expert, the acknowledged superior quality of the Menominee timber is not weighed in the Miller appraisal.

A discount of 6 percent is taken in the Menominee appraisal, presumably for location. Yet Mr. Steigerwaldt, the forestry expert, had concluded that its location compared favorably with that of Sale "A".<sup>76</sup> The Miller appraisal gives no apparent consideration to the substantial recreational value of the Menominee Forest. Sale "A" had no recreational value.

Although Sale "B" was comparable in total size, it consisted of 239,559 acres in noncontiguous and scattered tracts spread over seven counties in Michigan's Upper Peninsula. It was purchased for its pole stands, not for sawtimber, and as Mr. Steigerwaldt had reported to Mr. Miller, "it is a poor comparable for sawtimber types." Nevertheless, no adjustment is made in Mr. Miller's appraisal for the superior location of the Menominee Forest, for its excellent transportation system, for its advantage of being a single, solid tract, and for the far superior quality of its timber. In fact, an adjustment [59] solely for the greater quantity of sawtimber in the Menominee Forest would raise its value to \$35,652,000, if Sale "B" is used as a comparable.

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<sup>75</sup> Pole stands of mixed hardwood and aspen were an important factor in Sale "A". They are excluded in the Menominee appraisal.

<sup>76</sup> The location of the Menominee Forest in relation to a road system, a railroad, and a cluster of veneer mills in the heart of a paper-producing state, make it at least the equal of Sale "A" on this factor.

Mr. Steigerwaldt had rejected Sale "C"<sup>77</sup> as a comparable because it was in small, scattered parcels, presented difficulties in access, lacked water and road networks, and because of unreliable information as to its sale price. Mr. Miller, nevertheless, weighed it in his appraisal.

Sale "D" consisted of only 18,417 acres in Michigan, including 4,000 acres of water. The property had been purchased by the U.S. Forest Service for its recreational value. Mr. Steigerwaldt observed with respect to its virgin timber, that:

[I]t may be esthetically appealing, but for market value as sawlog material it is not as valuable as the stem selection cut stands of the Menominee Forest. The \* \* \* tract has virtually no road system and none of the lakes were accessible unless approached by walking and portaging with canoes \* \* \*.

Mr. Steigerwaldt valued the lake frontage in Sale "D" at \$7.20 per front foot.<sup>78</sup> Mr. Miller compared the Menominee acreage and Sale "D" solely as forest lands, excluding their recreational value, although defendant's experts valued the [60] recreational potential of the Menominee Forest at \$2.1 million under the income capitalization method of appraisal later used as a check. Furthermore, he made no adjustment in favor of the Menominee Forest by reason of its excellent location and road system.<sup>79</sup>

Mr. Miller rejected Sale "E" to the U.S. Forest Service "due to lack of definitive data." It consisted of three tracts totalling 2,900 acres in two Wisconsin counties. Mr. Steigerwaldt described its timber as "poorer than

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<sup>77</sup> 52,000 acres in the Upper Michigan Peninsula.

<sup>78</sup> The Menominee Forest has about 35,000 more feet of water frontage than Sale "D".

<sup>79</sup> Sale "D" had no road system.

the Menominee as the selectively cut Menominee Forest has a greater diameter and volume range at different ages, plus better quality sawlog material.<sup>80</sup>

Sale "F" consisted of about 24,000 acres scattered over many townships in parcels less than a section in size.<sup>81</sup> It had virtually no water resources. Mr. Steigerwaldt concluded that:

The timber types and specie composition would be comparable to the Menominee *for* [61] *about one-half* their timber acreage. \* \* \* On the selection cut areas we would state that the two forests are comparable, but *the residual volume per acre* is greater on the Menominee Forest. \* \* \* and hence the stumpage conversion value would be about half of the Menominee Forest. [Emphasis supplied.]

Although it is clear that defendant's forestry expert considered only about one-half of the Sale "F" timber acreage to be comparable in quality to the Menominee Forest, and that an adjustment was also to be made for its greater volume per acre, he inexplicably computed board feet per acre over the entire forested area, including the noncomparable half. Mr. Miller then based his adjustments on all the forest area in Sale "F", although only half had been deemed comparable in quality by Mr. Steigerwaldt.

Finally, comparable Sale "G" consisted of 25,000 acres in Michigan purchased for its sawtimber. Mr. Steigerwaldt reported that the "indicated volume per acre of

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<sup>80</sup> He added that the water resources of the Menominee Forest were also superior. It is noteworthy that Mr. Steigerwaldt used the recreational potential of Sale "E" to enhance his stumpage appraisal by 263 percent. In contrast, the Banzhaf appraisal offered by plaintiffs added nothing to the valuation of the Menominee Forest for its recreational potential, this being one of the safety factors earlier mentioned.

<sup>81</sup> In contrast to the Menominee Forest as a single block.

1,500 board feet is very much below the Menominee and would not be a good comparable." In making his adjustments, however, Mr. Miller used a figure of 2,000 board feet per acre rather than 1,500.<sup>82</sup> [62] If Sale "G" is used as a comparable, and the correct figure of 1,500 board feet per acre is substituted in his formula, the fair market value of the Menominee Forest would compute to \$46,215,000, a figure considerably larger than proposed by plaintiffs' expert witness.

In short, none of Mr. Miller's adjustments of the "comparables" under his market data approach, takes into account the acknowledged superior quality of the Menominee timber. His appraisal is, moreover, computed on a weighted average value rather than by individual species. The explanation of how the weighted average is achieved is inadequate. There is no explanation as to why the weighted average value is then discarded in favor of a so-called "median" figure, or why that figure is then rounded off by dropping about \$500,000. Overall, the appraisal employs "comparables" of questionable validity, as earlier illustrated, and it fails to make all necessary adjustments to equalize differences between the proposed comparables and the Menominee Forest. The result is an appraisal of comparatively little probative value.

As earlier mentioned, the market data method of appraisal is then checked or confirmed by an income capitalization approach. It is also questionable. Mr. Miller's income capitalization appraisal assumes as a starting point, a stabilized, [63] inflexible, allowable annual cut of only 27,500 MBF<sup>83</sup> based on sustained yield management. But this section of the appraisal is supposed to be based

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<sup>82</sup> He also erred in substituting the figure \$1,115,000 for the figure \$1,150,000 in reporting the stumpage inventory value of Sale "G".

<sup>83</sup> Elsewhere stated to be 27,800 MBF.

on market value disregarding the deed restrictions.<sup>84</sup> The Banzhaf report had estimated an annual harvest based on annual growth plus liquidation of the existing excessive stocking of 296 MMBF, over a period of 45 years.<sup>85</sup> It was estimated that it would take an additional annual cut of 19,733.3 MBF over and above annual growth, to liquidate the excess stocking within a single cutting cycle of 15 years. This removal of excess stocking would be over and above an estimated annual allowable cut (under sustained yield prior to 1961) of 27,697.2 MBF. Similarly, the Rickard report estimated a potential annual cut under sustained yield management of 35,500 MBF during the years 1962-71, based on annual growth, excess inventory, and elimination of "priority" trees which must be cut due to their condition.<sup>86</sup>

[64] In addition to assuming an annual cut of only 27,500 MBF, the Miller income capitalization appraisal applies a value per MBF based on an internal bookkeeping formula. But Menominee timber had not been sold on the open market. It was processed at Menominee Mills. The formula did not therefore accurately reflect open market or commercial value. Mr. Miller then deducted the estimated administrative costs of forest management under sustained yield,<sup>87</sup> plus taxes under the

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<sup>84</sup> This allowable annual cut is, moreover, below that estimated by defendant's Professor Carow, *with* a sustained yield restriction. He figured 30,297 MBF from 1961-71; 32,650 MBF from 1971-80; and 35,000 MBF thereafter. His higher estimates are confirmed by defendant's forester who possessed first-hand knowledge and experience of the forest extending over a number of years.

<sup>85</sup> Three cutting cycles of 15 years each.

<sup>86</sup> A 1961 Forest Management Plan prepared by defendant's forester and approved by the Wisconsin Conservation Commission notes that an overstocked, old, and slow-growing forest will benefit from an early, accelerated harvest designed to reduce inventories to efficient levels of stocking relative to growth.

<sup>87</sup> Which were higher than management costs under other alternatives.

Wisconsin Forest Crop Law, to estimate annual income which he then capitalized at a rate of only 2.5 percent. The rate was justified on the grounds that "agricultural lands of any type are usually sold on low interest rates, much lower than other types of property. \* \* \*" <sup>88</sup>

Mr. Miller also erred in using sales figures collected under his basic market data approach to confirm his income [65] capitalization rate, which is then used to check and confirm the market data appraisal.<sup>89</sup> It is not valid to determine the income capitalization rate of the Menominee Forest on the basis of the sales prices of other properties which were not comparable, nor was the sawtimber income of those properties comparable to that of the Menominee Forest. For all of the foregoing reasons, it is concluded that the income capitalization approach employed to check the market data appraisal, is likewise of little probative value.

On all the evidence of record, it is concluded that the fair market value of the Menominee Forest as of April 1961, and disregarding the deed restrictions, was \$38 million. For all of the reasons previously detailed, the Banzhaf appraisal of \$39,893,680, and the Rickard appraisal of \$38,456,900, are clearly more reliable than the

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<sup>88</sup> Plaintiffs' rebuttal witness, Dr. Harkin, testified that the rate of return on investments in agricultural land is substantially higher than 2.5 percent. Including capital gain income (which other expert opinion would include) he found a net average return of 7 percent investment in agricultural land during the period 1949-68. He attributed the comparatively low actual return of the Menominee Forest in prior years to mismanagement and overstocking which fails to reflect the actual market value of the property under improved management.

<sup>89</sup> He stated that "it's a very simple matter of dividing the net annual income by *the sale price* and it will give you the capitalization or interest rate on which *that property sold*." [Emphasis added.]



Miller appraisal of \$32 million.<sup>90</sup> Plaintiffs argue for a figure of \$39.2 million, that being the approximate average of the Banzhaf and Rickard fair market values. It has been found that both those appraisals were conservatively developed, with a number of safety factors in lieu of discount to reduce the original Banzhaf figure, and a discount-to-present- [66] value to reduce the Rickard appraisal.<sup>91</sup> Nevertheless, it has been concluded that this average figure, derived from two well-documented and conservative appraisals, should be somewhat further reduced. It is not free of doubt that the safety factors employed in the Banzhaf appraisal would fully account for discount-to-present value. Nor is it free of doubt that the milling and logging costs deducted from veneer and rough lumber prices in the Rickard appraisal would be the same as those generally available to a purchaser of the forest.

It is noteworthy that the value of \$38 million which has been determined is not far from the Miller appraisal. It is, in fact, partially confirmed by that appraisal despite the essential adjustments which it omits, as above detailed. Properly adjusted, the Miller appraisal urged by defendant would equal or exceed \$38 million. Although the "comparables" employed are not comparable in quantity,<sup>92</sup> or quality,<sup>93</sup> Mr. Miller nevertheless achieves a "weighted average value" of \$35,430,000 which he then explicably reduces. Two other downward adjustments [67] which are explained, are unwarranted.<sup>94</sup> Without

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<sup>90</sup> Also stated as \$31 million at other points in his report.

<sup>91</sup> Plaintiffs' rebuttal witness, Dr. Harkin, preferred the Rickard appraisal because it developed values based on actual sales of Menominee timber (reduced by milling and logging costs).

<sup>92</sup> Insufficiently adjusted.

<sup>93</sup> Not adjusted at all.

<sup>94</sup> Sale "A" is given a 6 percent upward adjustment for "location" without any support in the record. Sale "D" is given an unwarranted credit of 10 percent for "forest ratio."

those unwarranted adjustments, Mr. Miller's "weighted average value" for the Menominee Forest would compute to \$36-\$37 million. With proper adjustments for quantity, quality and location, as a single tract, the Miller appraisal would equal or exceed \$38 million.<sup>95</sup>

*Appraisals of the Fair Market Value of the  
Menominee Forest With a Sustained Yield  
Restriction of the Type Contained  
in the Deed*

Before discussing the expert appraisal testimony on the impact of the specific sustained yield restriction imposed in this particular case, it would be useful to examine some of the characteristics of sustained yield forest management as it is generally and normally practiced. In the broad terms employed in the Termination Act, for example, sustained yield is regarded as the dedication of a forest property to the permanent production of forest products in the form of sawtimber [68] logs, pulpwood, or some other forest product or combinations thereof. It envisions management or planning of forest production so that it is perpetual or continuous.<sup>96</sup> However, in commercial practice continuous growth can be achieved in many ways, for example, by selective cutting,<sup>97</sup> or by clear-cutting sections of the forest followed by replanting.<sup>98</sup>

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<sup>95</sup> It in fact does equal or exceed \$38 million if comparison is limited to Sale "D", which provided the most comparable market data in Mr. Steigerwaldt's opinion. Furthermore, and as detailed above, Mr. Miller's "income capitalization" check is deficient because it proceeds from a projected annual cut and an estimated value per MBF which are both too low and lack support in the record.

<sup>96</sup> Although not necessarily at an even rate.

<sup>97</sup> As practiced in the Menominee Forest under the prior trusteeship.

<sup>98</sup> Thus regenerating those clear-cut sections for permanent productivity. Defendant's expert witness quoted the definition pub-

Under the 1908 Act initiating the trust relationship herein, sustained yield management had not been scientifically practiced by defendant. The annual cut had been inflexibly limited to 20,000 MBF without regard to actual inventory or annual growth.<sup>99</sup> However, flexibility is essential to good forest management. Commercial foresters must be in a position to take advantage of market fluctuations and other important economic considerations while, nevertheless, practicing sustained yield. In normal commercial practice, sustained yield permits management to establish an annual cut at its most efficient level [69] at that time, and consistent with that particular management's business objectives.

In ordinary circumstances an owner establishes his own management plan (including self-imposed limits on the cutting of timber) but the plan, while governing the annual harvest generally, can be quickly and readily adjusted to meet market fluctuations, changed conditions in the forest, and advances in forest utilization. If his financial well-being requires, an owner can adjust his sustained yield plan to permit the sale of timber, or even land and timber, to produce maximum revenues as and when needed. These adjustments can then be offset if necessary with reductions in annual cut consistent with market conditions. This type of management is at the option of a commercial owner and it is not subject to external controls.

In contrast, the sustained yield restriction contained in the deed returning the Menominee Forest to plaintiffs was involuntary and inflexible. The Forest Management

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lished by the Society of American Foresters, namely, "management of a forest property for continuous production with the aim of achieving at the earliest practicable time approximate balance between net growth and harvest, either by annual, or somewhat longer period."

<sup>99</sup> Those circumstances form the basis for the claim in this series entitled "Forest Mismanagement," Docket No. 134-67-B.

Plan which MEI was obliged to prepare could not be put into effect nor changed without the approval of the State of Wisconsin. Under the terms of the deed from defendant to plaintiffs, the state was authorized to enjoin any deviation from the plan or any interpretation of the plan with which it disagreed. Under such a restriction, management of the [70] forest is not wholly vested in its owners. Supervisory control over management is lodged in the State of Wisconsin. MEI was not privileged to institute a change in cutting patterns and to put it promptly into effect as could any commercial owner. Changes in membership of the state commission could result in modifications of approvals previously granted.

In addition, the interests of the state government were in conflict with the best economic interests of the owners of the forest. Interests of the state centered around preservation of the aesthetics of the forest for all its citizens. The Menominee Forest represents 10 percent of the total standing timber in the State of Wisconsin and it is the largest hardwood forest in Wisconsin. This fact was the basis for the state's insistence on a sustained yield retraction of a particular type, enforceable by state injunction.

The 1961 forest plan prepared by defendant in cooperation with the Wisconsin Conservation Commission, was based on a harvest capable of removing only excess inventory and priority trees. It provided no allowance for annual growth and was therefore destined to once again create a problem of excess inventory. Under the plan, harvest was arbitrarily limited to certain prescribed areas each year. Cutting priorities were unrelated to existing market conditions.

[71] The Menominees were not free to fully develop the recreational potential of their forest because the state reserved the right to control withdrawal of specifically limited acreage from the forest, and then only on a show-

ing of a higher economic use for the parcel to be withdrawn. All of these restrictions were consistent with preservation of the Menominee Forest as a public aesthetic asset and with state and federal plans which at times had contemplated federal or state acquisition of the forest as a park. They were, on the other hand, inconsistent with sound commercial management of the forest and maximum utilization of its economic value in the best interests of its owners.

The state would be unlikely to approve a plan for a temporary high harvest in excess of growth, or a radical change in an existing plan to take advantage of a temporary high market in a particular species, or to adjust to a low market in another species, or to satisfy an urgent cash need, or to effectuate a necessary reduction in excessive stocking. MEI was apparently prohibited from departing from this inflexible sustained yield restriction even in a situation where there was no market for its hardwoods, or if it were necessary to avoid bankruptcy.

The issue, therefore, is the effect of this type of inflexible, sustained yield requirement, imposed by deed, and coupled with [72] externally applied, governmental, nonowner regulation of the owner's prerogatives, on the fair market value of the Menominee Forest. Specifically, market value to a prospective purchaser is the issue, since the restriction was imposed in perpetuity. Accordingly, plaintiffs' experts measured the diminution in market value resulting from this specific sustained yield deed restriction, by comparing the value of a flexible sustained yield management program matched to a particular owner's best economic interests with the restricted Menominee property governed by externally applied, governmental, nonowner regulation of the owner's prerogatives. They did not, as defendant erroneously assumes in its argument, base their comparison computations on a total liquidation of the forest.<sup>100</sup> Plaintiffs' computations based

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<sup>100</sup> Some purchasers might in fact conclude that a total liquidation program was most feasible and consistent with the general



on commercial practice presume an annual allowable cut equal to annual growth, plus a harvest of excess standing inventory and high priority trees. Their comparisons are offered [73] as the *minimum* value of the discretion vested in a prospective purchaser to recoup his investment as quickly or slowly as individual circumstances dictated. Theirs was, moreover, an allowable cut found by plaintiffs' experts to be perpetually sustainable.

Based on the various limitations above-described, the Banzhafs concluded that the market value of the Menominee Forest was reduced by 60 percent by the sustained yield restriction imposed by the deed. They employed two methods or approaches in quantifying that diminution in value. Under a "recovery of investment" approach, an assumed volume per acre in 1961 of 9 MBF is multiplied by a weighted stumpage value for all species of \$25 per MBF to produce a stumpage value per acre of \$225.<sup>101</sup> An annual growth rate of 2 percent is established by dividing annual plot growth (as taken from the 1970 CFI) by total saw-timber plot volume shown in that CFI. An annual cut limited to growth would therefore have a value of 2 percent of \$225, or \$4.50. Thus it would take over 50 years to recover an investment of \$225 per acre. The present value of a series of payments of \$4.50 per

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definition of sustained yield. Mr. Banzhaf observed that absent this specific deed restriction, the Menominee Forest could be purchased by a paper mill with a plan to harvest all sawtimber in order to recoup the initial investment as rapidly as possible, while at the same time converting the forest to pulpwood which is harvested at shorter intervals and is therefore more profitable to a paper mill. This type of program would fall within the definition of sustained yield management coupled with ordinary commercial flexibility. It would not, however, be permissible under this deed restriction as administered by the state and as uniquely imposed upon the Menominees and its successors in interest.

<sup>101</sup> The actual figures assumed are unimportant since the calculations which follow produce the same relative results with alternative assumed figures.



year for 50 years, is determined by discounting \$225 at 5 percent to \$82.15. That comes out to 36 percent of the 1961 [74] per acre value.<sup>102</sup>

In their alternative "capitalization" method, the same \$4.50 in annual income is capitalized at 5 percent to produce a value of \$90 per acre,<sup>103</sup> that is, 40 percent of the 1961 per acre value of \$225. These computations are the bases of the Banzhaf conclusion that the value of the Menominee Forest at termination, with the externally and legally imposed and regulated sustained yield restriction, was 40 percent of their figure of \$39,893,680, namely, \$15,957,472. They conclude that "this figure reflects the fact that MEI does not have control over the total timber volume, but only over the growth on that volume."<sup>104</sup>

[75] Mr. Rickard, the forest economist, testified that a prospective purchaser could value the forest based solely on what he could be assured the state would permit him to harvest. He too was concerned with the destruction of flexibility caused by the deed restriction because it deprives an owner of the use of his property and of the

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<sup>102</sup> The 5 percent discount rate is selected as tied directly to the prime interest rate for commercial loans in 1961.

<sup>103</sup> A prospective purchaser would be justified in expecting an overall return on his investment at least equivalent to the 5 percent payable on a conservative savings bank account. The Banzhafs therefore used bank rates rather than a capitalization rate based on market data. The latter must be based upon a weighted average of comparable businesses which is difficult, if not impossible to determine because "market conditions reflect extremely local conditions." The Banzhafs similarly rejected the 2 or 3 percent income based upon growth rate as a basis for capitalization for the reason that this approach fails to reflect that a forest of this size would be purchased as a "wood resource base" to "supply (inventory) protection," and it must therefore be considered in relationship to other similar investment in determining its value.

<sup>104</sup> Plaintiffs question whether MEI would even have total control over "the growth on that volume." They are limited not only with respect to the total allowable cut, but also as to when and where that cut may be taken.

capacity to develop plans and strategies adapted to changing economic circumstances.<sup>105</sup>

In quantifying the diminution in market value resulting from the deed restriction, Mr. Rickard assumed an annual cut of about 30,000 MBF, multiplied by an assumed value of \$40 per MBF, to estimate annual anticipated income of \$1,200,000. He capitalized that income at 10 percent<sup>106</sup> to compute a value of \$12 million as the top price he would recommend were he serving as a consultant to a prospective buyer. He concluded that a buyer would not know how the state regulating agency would define "sustained yield" and could reasonably expect that annual cut would be [76] limited to annual growth.<sup>107</sup>

Plaintiffs' rebuttal witness, Dr. Duncan Harkin, testified that:

The existence of restrictions implies some agency to administer these restrictions so that the forest owner operating under such restrictions would continually have to ask himself whether his concept of sustained yield is the same as that of the administering agency.

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<sup>105</sup> "By the same token, he can't accommodate to changes in the market, market places, forest products market prices, lumber, plywood, veneer, and so on, they are very cyclic, and they are not only cyclic over a period of years, but they are cyclic between species."

<sup>106</sup> Mr. Rickard adopted 10 percent based on his experience as a forest economist. In this industry, a reasonable expectation of productivity is 10 percent after taxes. A prospective purchaser would, in his opinion, determine how much he could afford to pay for a forest based on anticipated recoupment of his investment over a 10-year period.

<sup>107</sup> If actual figures are substituted for Mr. Rickard's assumed figures (*viz*, 28,900 MBF times \$43.70 per MBF average saw-timber value), the result is quite close to the one he computed. Those figures result in annual income of \$1,254,190, capitalized to \$12,541,900.

This uncertainty and inflexibility would in and of itself reduce fair market value.<sup>108</sup>

Another rebuttal witness for plaintiffs, Mr. Robert E. Kleiner, is President of Western Timber Service, Inc., a firm previously employed by defendant to appraise the Klamath Indian Forest in another case. Defendant was attempting to sell 11 parcels of the Klamath Indian Forest at a time when there was strong demand for its timber. In that case the parcels were offered [77] under a legally imposed sustained yield limitation, and Mr. Kleiner's assignment for defendant was to appraise the fair market value of that forest "and in addition we were to make an analysis if the value of the property were operated on a sustained yield basis \* \* \*."

Mr. Kleiner's firm submitted an appraisal to defendant of \$138 million for fair market value, and \$123 million for "realization value,"<sup>109</sup> but only \$43 million for the sustained yield value of the Klamath Indian Forest. The sustained yield value was only about 32 percent of fair market value, and only about 35 percent of the lesser figure defined as "realization value." In the Klamath case, Mr. Kleiner's appraisal report was adopted by the Secretary of the Interior on behalf of defendant. There-

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<sup>108</sup> The witness also preferred the 10 percent capitalization rate employed by Rickard over the 5 percent rate used by Banzhaf, which he described as "rock bottom," being no more than a conservative savings account would produce. Rickard's rate was more relevant, in his view, because of potential opportunities for investment and improvement of the Menominee Mill. Such investments yield returns of 8 to 12 percent after taxes, which averages to 10 percent.

<sup>109</sup> Mr. Kleiner's firm was also to make an appraisal of the "realization value" of the Klamath Forest for defendant. This was defined as something less than fair market value (because of certain other restrictions on the sale) but it was more than the sustained yield restriction value. A purchaser at "realization value" was not required to operate the forest under a sustainable yield restriction.

after, the Klamath Forest was divided into 11 tracts for sale, but subject to a legally imposed sustained yield limitation. They were not to be sold at less than "realization value" which is less than market value. The result was that only one of the tracts could be sold.

Mr. Kleiner was of the opinion that the Klamath Forest failed to sell because of the sustained yield restriction. He [78] stated:

A buyer who had to operate under sustained yield restrictions could not justify the realization price. It was too high under those conditions. Without those conditions I believe those units would have sold for the realization price or higher.

This, of course, illustrates the effect of a legally imposed sustained yield restriction upon realization value in an actual case, a case in which realization value is defined as less than market value. Mr. Kleiner's determination of a 68 percent diminution in fair market value lends support to the other expert opinions that market value of the Menominee Forest was reduced by 60 to 70 percent following imposition of the deed restrictions. His testimony based on the Klamath Forest experience is also confirmed by testimony of George Weyerhauser at a congressional hearing on the Klamath Termination Act.<sup>110</sup>

A specific test of the market for the Menominee Forest occurred when the Menominee Coordinating and Negotiating [79] Committee was being urged by a number of tribal members to totally liquidate the tribal assets, as an alternative solution for problems confronting the tribe following termination. A large neighboring lumber com-

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<sup>110</sup> Testifying on behalf of Weyerhauser Timber Co., he sought the right of commercial foresters to purchase the Klamath Forest. Recognizing that such sales should be acceptable to conservationists and therefore subject to a sustained yield restriction, he proposed that the difference between fair market value and market value under a sustained yield restriction, be paid by the Government to the Klamath Indians.

pany was of the opinion that it could pay no more than 30 percent of market value if obliged to comply with a sustained yield limitation requiring 50-75 years to harvest the stumpage volume then present. In addition, a professor of commerce at the University of Wisconsin, serving as a business consultant to MISC, concluded that the value of the forest under deed restriction (based on capitalization of income) would be 33 percent of its value disregarding the sustained yield restriction.<sup>111</sup>

Defendant's principal argument is that this deed restriction resulted in no diminution in fair market value, and that on the contrary, the restriction served to enhance the market value of the Menominee Forest. It is an untenable argument with no support in the record. It proceeds from the premise that a prudent owner would practice sustained yield management in any event. But this argument totally ignores the distinction between the general, flexible, commercial concept of sustained yield management in a specific owner's best economic interest, and the inflexible state-controlled deed restriction imposed in this case. The normal commercial prerogatives of the Menominees (or of a prospective purchaser) would have to give way to external, governmental, nonowner regulation. In effect, any private owner would have a governmental partner. This would inevitably have a depressing influence on market value, as graphically illustrated by the Klamath Forest experience and the other evidence above reviewed.

It is also argued by defendant that the drop in market value found by plaintiffs' experts results from a change in

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<sup>111</sup> When the previously described Forest Tax Bill was under consideration and it was assumed that the value under deed restriction and it was assumed that the value under deed restriction would be 40 percent of market value, a member of MISC took exception to that percentage in a letter to the Attorney General, reminding him that "the testimony everywhere is that the value of a sustained yield forest is 30% to 40%." He expressed a preference for 33½ or 35 percent.



appraisal method.<sup>112</sup> Accordingly, Professor Carow, testifying for defendant, assumed a 2 percent annual growth rate and a 5 percent capitalization (or interest) rate, and concluded therefrom that the forest had a value of \$16,654,000 under a 10 or 20-year *liquidation* plan, and a value of \$17,713,000 under sustained yield. Defendant argues from that type of comparison that the value of the land with or without the sustained yield "feature" [81] (as it describes the restrictions) is the same.

That reasoning proceeds from an irrelevant comparison. Liquidation is not the sole alternative nor even a desirable alternative to the involuntary, inflexible, external, state-regulated sustained yield restriction imposed in this case. The deed restriction should properly be compared to the flexible, voluntary management programs available to any owner seeking to operate his forest in his own best economic interest.<sup>113</sup>

Defendant further argues that:

[T]he sustained-yield imperative is not applicable to forest areas released therefrom under the laws of Wisconsin in a manner prescribed by the tax law, including,

(11) The owner may, without approval \* \* \* withdraw from taxation under this section, any parcel \* \* \* *not more than 10 acres in size.*

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<sup>112</sup> Namely, from stumpage value (disregarding restrictions) to capitalization of income (under restrictions). It is relatively useless, however, to determine stumpage value of a forest under restrictions, when the only incident of ownership to be enjoyed is the income from harvest of annual growth.

<sup>113</sup> Defendant's inappropriate comparison has other flaws. It reduces stumpage values found by the Bureau of Indian Affairs by 70 percent, a reduction which is unwarranted and unsupported by the record. It furthermore assigns no value to the land following the assumed liquidation of the forest, although it would have considerable market value for reforestation, or other use.



Such withdrawals shall *not total more than 250 acres in any calendar year.*

(12) Withdrawal of any parcel of land larger than 10 acres in size, or any withdrawal which results in a cumulative total of more than 250 acres withdrawn in any one calendar year, *shall [82] require the approval of the commissioner of taxation.* \* \* \* Any withdrawals under this section shall be made *only for the purpose of dedicating the lands to a higher beneficial use.* \* \* \* The commissioner of taxation may require *such assurances from the owner as he deems necessary to guarantee that the lands will be dedicated to a higher beneficial use.* [Emphasis supplied.]

The rigidity of these statutory requirements for withdrawal from the restrictions serves only to buttress plaintiffs' arguments. A mere reading of them illustrates that they provide no meaningful avenue of relief from the basic restrictions imposed. Defendant's experts were themselves of the opinion that the highest and best use of the Menominee Forest was as an industrial forest. Therefore it would be difficult, if not impossible, to convince the State Conservation Commission<sup>114</sup> that withdrawal of parcels<sup>115</sup> should be permitted in order to serve a "higher beneficial use." Litigation would probably be required with the outcome very much in doubt. On the other hand, if permitted to be withdrawn in 10-acre parcels totalling not more than 250 acres in a given year,<sup>116</sup> it would take more than 900 years to remove the total [83] acreage in this forest from the deed restrictions. In short, the his-

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<sup>114</sup> Vested with authority to rule on such matters.

<sup>115</sup> Larger than 10 acres, or totalling more than 250 acres in a year.

<sup>116</sup> To avoid the "higher beneficial use" requirement.

tory of these restrictions and the reasons underlying them illustrate that withdrawal was not a viable alternative.

It is also urged by defendant that:

It seems reasonable to assume that prudent business transactions contemplated by Menominee Enterprises could not (and probably would not) be blocked by an arbitrary or capricious action of Wisconsin State officials. \* \* \* Alternatively defendant argues that no injury is sustained under the restriction until and unless Menominee Enterprises attempts to sell free of the deed covenants the land to a *bona fide* prospective buyer and are denied permission to sell.

The first part of this argument is purely conjectural. The second part is based on circular reasoning since it assumes that one could find a buyer for land encumbered with those restrictions. Experience gained in the attempted sale of the Klamath Forest and by the Menominee test of the market as above-described, would indicate otherwise. If it is meant, on the other hand, that the land could be sold to someone albeit at much lower price because of the restrictions, that is begging the very question at issue in this case.

In summary, there is no support for the opinion of defendant's experts that there was no diminution in market value (and in fact an enhancement in value) by reason of the sustained yield restriction imposed in this case. That opinion has nothing [84] to support it other than market data showing that tracts with a history of sustained yield management have in fact been profitably sold. It is an opinion which ignores the fact that those were sales of tracts being operated under commercial, flexible, and controlled sustained yield management plans developed in each case by management itself and voluntarily installed in the best economic interests of the economic owners. This special state-administered deed restriction is in sharp contrast to that. The only directly related market data in that type of case was the data developed for defendant in regard to the Klamath Forest. It demonstrated that

prospective purchasers were not interested and that virtually no sales were consummated, although the forest was in all other respects a very attractive purchase.

Plaintiffs' method of appraising the diminution in market value resulting from a rigid, involuntary, state-regulated sustained yield restriction is both logical and credible. It employs an income capitalization method because annual income is the only incident of ownership available to the Menominees or their successors or assigns under the deed restriction. And the figures produced by that method of appraisal are fully confirmed by the only relevant market data evidence produced by either party, namely, the unsuccessful attempt to sell the Klamath Forest [85] under a similar restriction. Plaintiffs' experts concluded that the market value of the Menominee Forest was reduced by from 60 to 70 percent because of the sustained yield deed restriction. The most conservative of these appraisals was that of the Banzhafs who would place a value of 40 percent of the full market value on the forest, if burdened by the restriction.

It is concluded that the fair market value of the Menominee Forest with the sustained yield deed restriction is 40 percent of \$38 million, the market value heretofore determined disregarding the restriction. This results in a market value of \$15,200,000 for the forest when burdened by the sustained yield restriction imposed in the deed to the plaintiffs.

*Appraisals of the Fair Market Value of the  
Menominee Forest With the Additional Deed Restriction  
Against Sale or Encumbrance for 30 Years*

The impact of the 30-year deed restriction against sale or encumbrance is necessarily measured against the market value of the Menominee Forest as diminished by the sustained yield deed restriction, since the latter is in perpetuity. A 30-year restriction against alienation or encumbrance is embraced within the perpetual sustained

yield restriction, but is in addition thereto, and therefore has an additional depressing effect on market value.

[86] The Banzhals concluded that this additional restriction had the effect of rendering the forest virtually unsalable for 30 years, resulting in a further reduction in value of about \$7 million. The figure is achieved by taking the Banzhaf figure of \$15,957,472 (appraised value under the sustained yield restriction) and increasing it at the rate of 3 percent annually compounded for 30 years to account for normal increase in the value of the timber for that period. The resultant figure (\$38,732,933) represents the value of the forest in 1991. It is discounted at an interest rate of 5 percent for the 30 years during which it could not be sold, and during which the purchase price would lack investment value.

As a forest economist, Mr. Rickard testified that he would have to advise a prospective purchaser that buying the forest even at half its value under the sustained yield restriction would be a "terrific" gamble. An owner would be obliged to hold the forest for 30 years while the costs of ownership continued to run. He concluded this would reduce market value by at least an additional \$6 million.

In response, defendant again argues the above-quoted provision permitting withdrawal for "a higher beneficial use," and it further argues that no injury is sustained until plaintiffs try to sell free of the restrictions and are denied [87] permission to sell. Those arguments have previously been found unsupportable in the discussion of the sustained yield restriction.

The average of the Banzhaf figure of about \$7 million, and the Rickard figure of about \$6 million, is \$6.5 million. It is concluded that the effect of this restriction is further to reduce the fair market value of the Menominee Forest by \$6.5 million, namely, from the \$15,200,000 figure under sustained yield restriction above, to \$8,700,000 as encumbered by both deed restrictions.

*Effect on Market Value of the Loss  
of Property Tax Exemption*

Before determining the net damages sustained by plaintiffs as a result of the two deed restrictions, it is necessary to consider plaintiffs' argument that there should be added to the full market value of the Menominee Forest<sup>117</sup> the value of the Menominee Tribe's exemption from property taxes, an exemption which was lost when title was transferred by defendant after passage of the Termination Act.<sup>118</sup> Plaintiffs claim that there [88] should be added the sum of \$9,665,000 as a result of a study and opinion by the Banzhafs. It treats property taxes imposed after termination as additional income which would have been realized had the tax exemption continued, and it capitalizes that so-called "income" at 5 percent. Other taxes, specifically federal or state income taxes, are not reflected in the above figure because "Menominee income-producing operations were combined in the forest and the sawmills, and information regarding the forest portion of projected income and possible taxes was not readily available."<sup>119</sup>

This argument of plaintiffs is rejected at this time and in a review of this deed restrictions claim. Throughout the foregoing consideration of the evidence, appraisals have been offered and examined as a general test of fair market value, not by a comparison of the value of the Menominee Forest to this formerly tax-exempt owner, with its value in the hands of a typical owner subject to taxation.

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<sup>117</sup> That is, its value disregarding the deed restrictions.

<sup>118</sup> 25 U.S.C. § 898 provides that following any transfer, the assets transferred "shall be subject to the same taxes, State and Federal, as in the case of non-Indians \* \* \*."

<sup>119</sup> Plaintiffs aver that evidence as to the additional value of this lost income tax exemption when it is developed can be submitted at a subsequent hearing to be set by the court.



The tax exemption once available to the plaintiffs herein and lost with termination and conveyance of their assets was unique to the Menominees. Therefore the resultant monetary loss [89] was also an alleged element of damages unique to them. It is not, however, an element of fair market value to be used in construing the price that would be paid by a willing buyer to a willing seller. Since determination of fair market value has been the process employed by both parties in this deed restrictions case, and because proof of damages by reason of the lost tax exemption is incomplete in any event,<sup>120</sup> computation of damages suffered by plaintiffs is herein confined to the difference between the fair market value of the Menominee Forest as of April 1961, disregarding the deed restrictions, and its value as of that date with both the sustained yield deed restriction and the 30-year deed restriction against alienation or encumbrances. That difference is:

Market value with restrictions	\$38,000,000
Market value with both restrictions	\$8,700,000
Damages	\$29,300,000

## VI. ISSUE OF CONSENT

Defendant urges herein that plaintiffs effectively consented to the imposition of those burdensome deed restrictions and are therefore not entitled to recover.

This deed restrictions claim grows out of the defendant's [90] failure to protect plaintiffs during a trust relationship which had begun in 1817, and specifically for the period during which proceedings and negotiations were being conducted in anticipation of the effective date of the termination of federal supervision and protection. Defendant's argument that the tribe "consented" to the

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<sup>120</sup> Note 119, *supra*. See also and *cf.* Order of March 21, 1980 (rehearing denied April 25, 1980) granting defendant's motion for summary judgment in the separate "Loss of Tax Exemption" claim, Docket No. 134-67-F, as barred by the statute of limitations.



imposition of these deed restrictions is totally unconvincing, particularly when evaluated against the sharp reduction in market value which they caused. As outlined earlier, they grew out of negotiations following enactment of the Termination Act. The facts show that in the course of termination, Congressman Reuss became concerned and successfully moved to amend the Termination Act because "termination would subject the tribal lands and the Menominees to state taxation without their consent, contrary to the treaty."<sup>121</sup> The restrictions followed from concern that imposition of state taxation would be fatal to the tribe's continuing economic existence, forcing it to overcut or sell the forest to meet basic needs. Preservation of the forest was in the best interests of the State of Wisconsin and the nation and its acquisition and preservation for park or national forest purposes had been considered from time to time.

The tribe had played no role in drafting the basic Termination Act, and were under heavy pressure to support the congressman's [91] amendment requiring some provision for protection of the forest. In any event, the key provision of the Reuss amendment, from the Indians' standpoint at least, was the elimination of the termination deadline which was in effect at that time, a provision not included in the final bill as enacted. It was thereafter that the Menominees were subjected to pressure to consent to a rigid and state-regulated sustained yield requirement if they were to obtain their own county from the State of Wisconsin following termination. In addition, the Reuss amendment proposed that the costs of specialists to study termination problems be paid out of federal rather than tribal funds, a change which the tribe

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<sup>121</sup> The congressman testified that:

"not only had the tribe not specifically consented to termination, but that it had been coerced by the threat to withhold the \$1500 per capita contribution, unless it 'consented' and this was in violation of the treaty."

sorely needed. Finally, the amendment authorized transfer to the tribe of title to any buildings and road equipment on their land, reconfirming their title to those assets. It is understandable in these circumstances that the Menominees would interpose no objection to Reuss amendment as such, particularly considering their then continuing status as wards of the United States.

Those federal officials directly charged with managing their property were in fact opposed to the restrictions. The Department of the Interior stated that the Termination Act "granted to the Menominee Indians the same rights with respect to their property that other citizens have. We believe that the tribe [92] should not be placed under special restraints by Federal law." Enactment of the law, it has been held, was not a breach of trust, but implementation of the law, and the terms under which their property was to be conveyed to them, continued to fall within the trust relationship. Acknowledging that the Menominees would probably as owners continue some form of sustained yield management in their own best economic interests, Interior officials recognized and nevertheless cautioned that they "should not be placed under statutory restrictions that are not applicable to other citizens of Wisconsin."

Despite an obvious conflict of interests between plaintiffs (as wards of defendant) and the State of Wisconsin, they did not receive the continuing protection to which they were entitled under their trust relationship with defendant in the course of their negotiations with the state.<sup>122</sup>

As detailed in the findings, plaintiffs' circumstances required above all a special tax law designed to preserve the forest from destruction to meet tax payments, yet capable

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<sup>122</sup> As previously noted, defendant acknowledges that had the state not required the sustained yield restriction, it would have done so in any event.

of producing sufficient tax income to support necessary public services. That tax system was available only in exchange for a statutory and state-administered sustained yield restriction, [93] binding upon future purchasers as well, plus a 30-year restriction against alienation and encumbrance, all as set forth in the deed from defendant to plaintiffs.

In these circumstances, defendant's argument that plaintiffs "consented" to the imposition of these inflexible, externally-regulated restrictions in the deed of their own property to themselves is totally unconvincing.<sup>123</sup> The tribe's failure to oppose the Reuss amendment is wholly explained by the need for other elements of the amendment, the inevitability of termination, the threat of an externally-imposed and potentially more disastrous alternative termination plan if they failed to approve the proposed plan, their need for state approval of a separate county and a special tax program, and their status as longtime wards of defendant.<sup>124</sup>

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<sup>123</sup> Particularly where those restrictions produce such an adverse effect on market value.

<sup>124</sup> Had the Menominees *requested* or even *demand*ed that restrictions be imposed on their property, the defense of "consent" would have been untenable because of defendant's full knowledge of plaintiffs' inexperience and incapacity in dealing with the issue of market value in a competitive society. Their incapacity is, ironically, offered as the very basis for the restrictions placed upon them. *See and cf. Oneida Tribe of Indians v. United States*, 165 Ct. Cl. 487 at 494 and 498 (1964), which observes that even where the deprecators were members of the plaintiff tribe, "[t]his, in itself, would not excuse the United States from shouldering all responsibility." In any event beneficiaries to a trust are capable of consent only after they have been exposed to a full, fair and good faith disclosure of all pertinent facts, and only if they are of full capacity.

## [94] VII. STATUTE OF LIMITATIONS

The defense of the statute of limitations has also been raised. It is unsupportable.<sup>125</sup> Plaintiffs' claim depends on whether or not a breach of fiduciary duty, or fifth amendment taking resulted from the imposition of these burdensome restrictions in the deed of its property from defendant to plaintiffs. Defendant urges that the statute of limitations began to run on November 26, 1957, when the final tribal roll was published in the *Federal Register*. That date is irrelevant.

A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.<sup>[126]</sup>

The deed restrictions underlying this claim were not imposed upon plaintiffs until delivery of the deed of their property on April 26, 1961.<sup>127</sup> No cause of action existed until that date. The earlier date proposed by defendant (November 26, 1957), has no relevance whatever to a claim based on the subsequent imposition of these burdensome deed restrictions.

## [95] VIII. EXCULPATORY LANGUAGE

Defendant also urges language in the Reuss amendment as exculpating it from responsibility for the reduction in market value resulting from the deed restric-

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<sup>125</sup> It is asserted by defendant on the basis of 25 U.S.C. § 2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." (Emphasis supplied.)

<sup>126</sup> *Japwancap, Inc. v. United States*, 178 Ct. Cl. 630, 632, 373 F.2d 356, 358, cert. denied, 389 U.S. 971 (1967).

<sup>127</sup> Suit was filed on April 25, 1967, within the requisite 6-year period.

tions.<sup>128</sup> The language relied upon was added in the course of hearings on the Reuss amendment by the House Committee on Interior and Insular Affairs. Congressman Pillion who sponsored the language explained that:

\* \* \* It is merely an insurance and guarantee that the United States will not be called upon to bail out any failure on the part of anyone to *properly manage* the sustained-yield program [Emphasis supplied.] <sup>[129]</sup>

The cited language obviously has no relevance whatever to plaintiffs' claim for reduction in the market value of their property based on the *imposition* of two restrictions in the deed to them of their property, restrictions limiting how they could manage, utilize, sell or encumber their own property. The language is clearly designed to protect defendant from any liability based on claims of forest mismanagement *following termination*, when defendant would no longer be involved in supervision of the Menominees and management of their forest.

#### [96] IX. JURISDICTION OVER THIS DEED RESTRICTION CLAIMS FOR BREACH OF FIDUCIARY DUTY

Defendant has mounted a broad attack on any of these cases insofar as it relies on breach of a fiduciary duty, asserting that this court has no jurisdiction in such matters. The argument presented is that a claim for breach of treaty or fiduciary obligations is not a "legal" claim, but is rather a moral or equitable one. Proceeding to contrast the jurisdiction of this court with that of the now

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<sup>128</sup> "The sustained yield management requirement contained in this Act \* \* \* shall not be construed by any court to impose a financial liability on the United States."

<sup>129</sup> It will be recalled that the judgment which had led to the issue of per capita distribution, and eventually to the Termination Act, involved a suit for prior Government *mismanagement* of tribal funds, forest and mill.

defunct Indian Claims Commission,<sup>130</sup> defendant points out that the Commission had jurisdiction over "claims of law or equity" and "claims based on fair and honorable dealings;" therefore, this court cannot entertain this case because it presents a moral or equitable claim.

The argument is not well taken. This court is vested with jurisdiction—

of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians \* \* \* whenever such claim is one arising under the *Constitution, laws or treaties of the United States* \* \* \* or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. [Emphasis supplied.] <sup>[131]</sup>

[97] Cognizable under that comparison is—

\* \* \* any claim against the United States founded either upon *the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States* \* \* \*. [Emphasis supplied.] <sup>[132]</sup>

In its review of the "basic" opinion in this case,<sup>133</sup> the court held generally that it lacked jurisdiction under section 1505 "to entertain the nonconstitutional claim that the enactment of the [Menominee] Termination Act of 1954 was a breach of trust by Congress for which plaintiffs can obtain monetary relief."<sup>134</sup> The opinion then

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<sup>130</sup> The Commission's entire remaining caseload was, incidentally, transferred to this court effective September 29, 1978, Act of October 8, 1976, 90 Stat. 1990, 25 U.S.C. § 70v.

<sup>131</sup> 28 U.S.C. § 1505.

<sup>132</sup> 28 U.S.C. § 1491.

<sup>133</sup> See text following note 3, *supra*.

<sup>134</sup> 607 F.2d at p. 1343. The enactment of the Termination Act had not been urged by plaintiffs, in and of itself, as a claim for monetary relief. As stated at note 2, *supra*, it was published merely for historical background for the specific claims to follow.



enumerates the types of claims that are jurisdictionally permissible.<sup>135</sup>

This "Deed Restrictions" claim does not rest on the enactment of the Menominee Termination Act. It rests rather on the grounds summarized earlier in this opinion.<sup>136</sup> It should be noted that the Supreme Court has recently held that 28 U.S.C. § 1505 does not in and of itself confer a substantive right to recover [98] damages against the United States.<sup>137</sup>

In its recent decision, the Court rejected a claim that a "trust" had been created by a specific statute involved in that case.<sup>138</sup> The majority ruled that the particular statute there involved was insufficient to create a trust, and therefore to constitute a waiver of sovereign immunity permitting recovery of money damages for its alleged breach. It concluded that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act." (Emphasis supplied.)<sup>139</sup>

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<sup>135</sup> See text following note 4, *supra*.

<sup>136</sup> See text following note 5, *supra*.

<sup>137</sup> *United States v. Mitchell*, 100 Supp. Ct. 1349 (1980). The same has been held with respect to the court's basic jurisdictional Tucker Act, 28 U.S.C. § 1491 (1976). *United States v. Testan*, 424 U.S. 392, 398 (1976).

<sup>138</sup> The General Allotment Act of 1887, 25 U.S.C. § 331-358.

<sup>139</sup> *United States v. Mitchell*, note 137, *supra*, 48 LW 4365 at 4368. The Supreme Court also stated at n. 7:

"The Court of Claims did not consider the respondents' assertion that other statutes, see n. 1, *supra*, render the United States liable in money damages for the mismanagement alleged in this case. Nor did the court address the respondents' contention that the alleged mismanagement is cognizable under the Tucker Act because

[99] The trust relied upon by plaintiffs herein has far broader support. Although not created by an express trust agreement or by express statutory language, it arose out of several historical sources and a very long course of conduct.<sup>140</sup> The trust relationship has been acknowledged by Congress and by several decisions of this court. Its creation is traceable at least back to the Treaty of Wolf River, Art. 2, 10 Stat. 1065 (1854), which granted certain lands to the tribe "to be held as Indian

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it involves money improperly exacted or retained. The court may, of course, consider these contentions or remand.

"The respondents make two other arguments. They assert that the special relationship between the United States and Indian tribes establishes a right to money damages for timber mismanagement. They also contend that the General Allotment Act and the Treaty of Olympia, 12 Stat. 971 (1859), create trust responsibilities on the part of the United States that constitute implied contracts within the scope of the Tucker Act, 28 U.S.C. § 1491. Because the respondents did not raise these contentions in the Court of Claims, we will not consider them. *E.g.*, *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)."

<sup>140</sup> Express trust language is not required to establish the existence of an Indian trust. In *Duncan v. United States*, 220 Ct. Cl. —, 597 F.2d 1337 (1979), the court held that an Indian trust existed despite the lack of express statutory language. The court relied, *inter alia*, on the Interior Department's long standing presumption that the Government owed fiduciary duties to the Indians, and the wording of a subsequent statute constituting an "acknowledgment" by Congress of the trust relationship. 597 F.2d at 1341-42.

In this case there are several subsequent acknowledgements by Congress of the trust relationship. The Menominee Termination Act of 1954 authorizes the Secretary of the Interior at termination "to transfer to the tribal corporation or to a trustee of the Secretary's choice \* \* \* the title to all property, real and personal, held in trust by the United States for the tribe." Ac of June 17, 1954 ch. 303, § 8, 68 Stat. 252, *as amended*. Likewise, the Menominee Restoration Act, 87 Stat. 770, *codified at* 25 U.S.C. §§ 903-903f (1976) states that upon reinstatement of federal supervision, "the land transferred [to the United States] shall be taken in the name of the United States in trust for the tribe." 25 U.S.C. § 903d(b); *see also* § 903d(c).

lands are held." By this treaty (and several others preceding [100] it)<sup>141</sup> the United States entered into a relationship with the Menominees which can be said to be "unlike that of any other two peoples in existence," and is one which "resembles that of a ward to his guardian."<sup>142</sup>

The scope of the Menominee trust relationship and defendant's fiduciary duties thereunder were fully articulated during the 107 years between the aforementioned Treaty of Wolf River, and termination of federal management, supervision, and control in 1961. During that period the management of the tribe's assets was entirely by the United States. Approximately 95 percent of the 234,000 acres of the Menominee Reservation are forest lands. Unlike the individual agricultural allotments involved under the General Allotment Act at issue in *Mitchell*, this timberland could not be managed by individual Indians.

The extent of the Government's control over the Menominee assets is summarized in a 1956 University of Wisconsin report:

In large measure the Bureau of Indian Affairs in the past maintained and accepted a "cradle to the grave" responsibility including not only control in the usual governmental spheres but also in the management and development of the forest resources, the lumber mill, and other employment and income opportunities open to Reservation residents. Government officials [101] and other outside individuals held all positions of responsibility and decision mak-

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<sup>141</sup> For a more comprehensive discussion of the series of treaties between the United States and the Menominee Tribe see *Menominee Tribe of Indians v. United States*, 179 Ct. Cl. 496, 501-02, 388 F.2d 998 (1967), *aff'd*, 391 U.S. 404 (1968).

<sup>142</sup> See and *cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1 Ed. 25 (1831), Marshall C. J. writing for the court.

ing \* \* \*. The National Government continues to supervise forest and mill operations and to retain final approval for all proposed expenditures of Tribal moneys.<sup>[143]</sup>

The tribe's role has been almost entirely passive. The tribal "General Council" functioned only as an advisory body to the BIA. The tribal "advisory committee" made only minor decisions, and gave advice to the BIA when the General Council was not in session.<sup>144</sup>

This historical and long standing course of conduct supports the conclusion that the parties had a tacit but clear understanding of their fiduciary relationship. The facts also give rise to a contract implied in fact, supporting the fiduciary relationship. There can be little doubt that the court has jurisdiction over and can render a money judgment for an alleged breach of implied contract inferred from the conduct of the parties.<sup>145</sup> Finally, the Act of March 28, 1908, 35 Stat. 51 [102] (hereinafter cited as the "1908 Act") "can fairly be interpreted" <sup>146</sup> as creating a substantive right to recover money damages in this case. Although the 1908 Act does not by its own terms create a trust, it gave defendant responsibility for management of plaintiffs' property. A special jurisdictional Act of September 3, 1935, ch. 839, 49 Stat. 1085, as amended by the Act of April 8, 1938, was specifically

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<sup>143</sup> University of Wisconsin Bureau of Government (Preliminary Report to the Menominee Indian Study Committee (1956) at 14-15, 29 (P. Ex. R-42).

<sup>144</sup> D. Getches, D. Rosenfelt, C. Wilkinson, *Federal Indian Law*, (1979) at 103.

<sup>145</sup> See e.g., *Cities Service Gas Co. v. United States*, 205 Ct. Cl. 16, 23, 500 F.2d 448 (1974).

<sup>146</sup> In *United States v. Testan*, 424 U.S. 392 (1976), the Supreme Court held that a statute creates a substantive right against the United States in money damages only if it expressly so provides, or if it "can fairly be interpreted" as creating such a right. 424 U.S. at 400.

passed to allow the tribe to bring suit for, *inter alia*, alleged violations of the 1908 Act. Congress thereby confirmed that the 1908 Act imposed full fiduciary responsibility on defendant's management. Section 3 of the jurisdictional Act provided in relevant part:

At the trial of any suit instituted hereunder the court shall apply as respects the United States *the same principles of law as would be applied to an ordinary fiduciary*. [Emphasis supplied.]

In *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944) the court considered this section of the jurisdictional statute, and added its confirmation that it created a full trust relationship. The court concluded that the express application of fiduciary standards to defendant's management "add[s] little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee."<sup>147</sup>

[103] In a subsequent case involving the tribe's claims of forest mismanagement in violation of the 1908 Act, the court further articulated the standards of conduct applicable to the Government, as trustee. It held that the Government's agents were obliged to exercise "good faith, diligence, care and prudence" in the management of the forest, and to manage it as they would their own affairs, or as a "commercial or industrial enterprise."<sup>148</sup>

This court has subsequently held that section 1505 of Title 28, enacted to replace special jurisdictional statutes such as the one discussed above, "did not discharge or cancel any fiduciary obligations of the United States."<sup>149</sup> The high fiduciary standards required of defendant un-

<sup>147</sup> 101 Ct. Cl. at 19.

<sup>148</sup> *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442, 507-08, 91 F.Supp. 917 (1950).

<sup>149</sup> *Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490 (1960).

der the 1908 Act continued to apply to defendant's management of the Menominee forest. It is thus concluded that the trust relationship between the United States and the Menominee Tribe imposes upon the Government the obligations of an ordinary fiduciary in its management of the assets and properties of the tribe.<sup>150</sup>

[104] It is inconceivable that a trust relationship of the scope and duration involved in this case would not carry with it a remedy for its breach. Moreover, since the trust relationship rests in part on a contract implied in fact, there can be no doubt that the court has jurisdiction to render a money judgment in a contract case.<sup>151</sup>

In summary, each of these cases depends upon an in-depth analysis of the particular facts underlying a specific claim. The facts supporting this "Deed Restrictions" claim have been exhaustively set forth earlier in this opinion. They demonstrate a long-standing fiduciary duty

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<sup>150</sup> This claim falls within a jurisdictional category expressly adopted by the court (*see* text following note 4, *supra*) namely:

"(d) the specific claims set forth in note 2, *supra* [enumerating all nine claims of the original petition] insofar as they do not rest on Congress's (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act."

<sup>151</sup> In *Mitchell*, note 137, *supra*, the Court stated that:

"We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, *the Act* would constitute a waiver of sovereign immunity." (Emphasis supplied.) The dissenting opinion, having found a trust based on the words of the General Allotment Act, went on to observe that liability—

"follows naturally from the existence of a trust and of fiduciary duties. It is hornbook law that the trustee is accountable in damages for breaches of trust." In the absence of such a remedy, the dissent further notes that there would be "little to deter federal officials from violating their trust duties." *See also, Mitchell v. United States*, 221 Ct. Cl. —, 591 F.2d at 1302 (1979), *rev'd* 100 Sup. Ct. 1349 (1980).



and a breach of that fiduciary duty by defendant, resulting in the damages analyzed above. [105] Following the effective date of termination of federal supervision and protection, the plaintiffs were no longer wards of defendant. They were entitled to receive their land from defendant unencumbered by burdensome deed restrictions. But until the termination procedures were completed, and while they were being planned and executed during the period 1954-1961, plaintiffs were still in a fiduciary relationship to defendant. During that period they were entitled to federal supervision and protection assuring that they would receive their property unencumbered, or its full monetary equivalent.<sup>152</sup> It was inconsistent to terminate the Menominees based on a conclusion that they were fully competent, while at the same time encumbering their property as if they were not competent, and restricting its use, sale or encumbrance for the benefit of others.

Interior Department officials charged with implementing the termination plan and with concurrent responsibility for protecting the Menominees as wards, expressly recognized the deed restrictions as unfair and discriminatory. Yet they acknowledged that they would have imposed even more stringent restrictions had the state not done so. The Indians did not receive the federal supervision and protection they were entitled to in the [106] course of their negotiations with the state and while they were still wards of defendant. Ultimately, the federal trustee transferred plaintiffs' property to them in greatly devalued form. All of this was undoubtedly motivated by the extraneous consideration "of preserving for all the people of Wisconsin and this country the superb Menominee forests."<sup>153</sup> In similar circumstances, federal or state

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<sup>152</sup> See and cf. the General Allotment Act, 24 Stat. 359 (1887), as amended, 25 U.S.C. §§ 348-349. Also see and cf. *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965).

<sup>153</sup> Congressman Reuss, in proposing his amendment to the Termination Act.

authorities have purchased a forest, at its market value, for development as a state or federal forest or park.<sup>154</sup>

For all the above reasons it is concluded that the court has jurisdiction over this case on the grounds of breach of fiduciary duty as one "arising under [the] laws or treaties" clauses of section 1505, as well as under the "implied contract" language of section 1491, as incorporated in section 1505.

#### X. THE ALTERNATIVE GROUNDS OF A FIFTH AMENDMENT TAKING

The sole remaining issue is whether or not plaintiffs are entitled to recover on the alternative grounds asserted, namely, a fifth amendment taking.<sup>155</sup> Plaintiffs argue essentially [107] that Congress enacted legislation, later implemented by the Wisconsin state legislature, and by a deed from defendant to plaintiffs, which denied to plaintiffs the right to take title to their forest at its full market value. This deprived them of the full and beneficial use of their land and therefore constituted a taking. Plaintiffs' right to administer, sell, or encumber its forest without statutory or deed restrictions is a property right protected by the fifth amendment.<sup>156</sup> Its measure is a comparison of before and after values.<sup>157</sup> Defendant's re-

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<sup>154</sup> Some of the "comparable" purchases offered by defendant on the earlier issue of market value, were for just such purposes.

<sup>155</sup> Recovery under these alternative grounds would carry interest. *United States v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119 (1938).

<sup>156</sup> See & cf. *Armstrong v. United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Chicago M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890); *Munn v. Illinois*, 94 U.S. 113 (1876); *Bent v. Emery*, 173 Mass. 495, 53 N.E. 910 (1899); *Allen v. McClellan*, 75 N.M. 400, 405 P.2d 405 (1965).

<sup>157</sup> See, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

sponse is that plaintiffs "consented" to the taking. The issue of "consent" has been disposed of in an earlier section of this opinion. As for the parenthetical denial that defendant has "acquired any interest," a taking occurs upon the deprivation of a property right, rather than upon a showing of an acquisition of an interest by the sovereign.<sup>158</sup>

In determining whether or not a taking has occurred it is necessary to decide if:

\* \* \* Congress in disposing of the property has made a good faith effort to realize its full value for the Indians, whether it has [108] in effect performed the trustee's traditional function of transmuting property into money.<sup>[159]</sup>

The clause of the fifth amendment at issue in this case states simply—"nor shall private property be taken for public use, without just compensation." The Supreme Court has stated that the:

Fifth Amendment's guarantee \* \* \* [is] designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.<sup>[160]</sup>

The determination of whether a particular governmental action rises to the level of a taking requires an essen-

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<sup>158</sup> See *Eyherabide, et al. v. United States*, 170 Ct.Cl. 598 (1965).

<sup>159</sup> *Klamath and Modoc Tribes v. United States*, 193 Ct. Cl. 670, 685, 436 F.2d 1008, 1015, cert. denied 404 U.S. 950 (1971). The opinion also states:

"In the general law of eminent domain there is no universal test to determine, where Congress has not expressed an intention to condemn, whether and when a taking has nevertheless occurred as a result of the Federal Government's conduct; a court must always evaluate the individual circumstances of the case to answer those questions."

<sup>160</sup> *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 123-24 (1978), citing *Armstrong, supra*, at 49.

tially ad hoc, case-by-case inquiry into the relevant facts.<sup>[161]</sup>

That the Government did not directly appropriate plaintiffs' property in this case, is not dispositive of plaintiffs' claim of a "taking." The term "property" has been broadly [109] construed to include the entire "group of rights inhering in the citizen's relationship to the physical thing, as the right to possess, *use and dispose* of it.<sup>162</sup> (Emphasis supplied.) Likewise, property may be "taken" by unduly onerous or unreasonable Governmental restrictions on use, as well as by outright appropriation:

Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title.<sup>[163]</sup>

Nor is the fact that the deed restrictions involved in this case could be removed by state or federal legislation, and that the restriction on alienation and encumbrance was limited to 30 years a bar to plaintiffs' taking claim.<sup>164</sup>

The issue in the taking aspect of this case is whether imposition of these deed restrictions was an exercise of the Government's power of eminent domain, requiring just compensation.<sup>165</sup> The test is as follows:

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<sup>161</sup> *Id.* at 124. See also, *Klamath and Modoc Tribes*, note 159, *supra*, at 685.

<sup>162</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

<sup>163</sup> Citing *Kaiser Aetna v. United States*, 100 Sup. Ct. 383, 390 n. 8 (1979), citing *Chicago, R.I. & P.R. Co. v. United States*, 284 U.S. 80, 96 (1931). See also *Carruth v. United States*, No. 20-78 (July 2, 1980), slip op. at 20; *Beneson v. United States*, 212 Ct. Cl. 375, 388, 548 F.2d 939 (1977).

<sup>164</sup> *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769, 572 F.2d 786 (1978).

<sup>165</sup> *United States v. Sioux Nation*, — U.S.L.W. at — (slip op. at 35-36).

[110] Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.<sup>[166]</sup>

There can be no serious doubt here that the conveyance of the land to the tribe with these burdensome restrictions was far more than a mere "change of form." When the Government agreed in the Treaty of Wolf River, Art. 2, 10 Stat. 1065 (1854), that the land would "be held as Indian lands are held," the property was free and unencumbered. As hereinbefore detailed, evidence at trial established that the fair market value of the land at termination with the restrictions was only a fraction of its value without them. The evidence indicated that the cost to the tribe of the restrictions was in excess of \$29 million, and yet the purpose of the restrictions was "preserving for all the people of Wisconsin and this country the superb Menominee Forest." No effort has been made by defendant or any of its officials to recompense the tribe for the diminution in value of its lands. The conduct of the Government thus falls far short of the "good faith effort to give the Indians the full value of the land" as required by the *Sioux Nation* case [111] above-cited. There is considerable evidence that throughout the termination proceedings, there was an intermingling of the best economic interests of the plaintiffs, with those of "all the people of Wisconsin and this country."<sup>167</sup>

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<sup>166</sup> *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968).

<sup>167</sup> See and cf. *Chippewa Indians v. United States*, 301 U.S. 358 (1937); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965).

## CONCLUSION

Upon the basis of all of the foregoing, it is concluded that plaintiffs are entitled to recover the sum of Twenty-nine Million Three Hundred Thousand Dollars (\$29,300,000), either as damages for breach of a fiduciary duty, or alternatively, as compensation for a fifth amendment taking, with interest as required by law.



**FINDINGS OF FACT**  
**GENERAL HISTORICAL BACKGROUND**

**JURISDICTION**

1. This action is brought pursuant to, and the jurisdiction of this court is founded upon, Sections 1491 and 1505 of the Judicial Code (28 U.S.C. 1491 and 1505).

**PARTIES PLAINTIFF**

2. *Tribes*. Plaintiff, the Menominee Tribe of Indians, is a recognized tribe of Indians which has existed since time immemorial, and which has always resided in what is now the State of Wisconsin. *Menominee Tribe of Indians, et al. v. United States*, 179 Ct. Cl. 496 (1967), *aff'd* 391 U.S. 404 (1968).

3. *Corporation*. Plaintiff, Menominee Enterprises, Inc. (hereinafter MEI), is a corporation organized under Chapter 180 of the Wisconsin statutes pursuant to a plan approved October 30, 1959 by the Secretary of the Interior for the future control of Menominee Indian tribal property and future service functions. In accordance with the plan, the Secretary of the Interior, following termination of his authority to supervise the tribe and its property, transferred the tribal assets to MEI. All stock ownership in MEI was issued to a voting trust, the trust to continue in existence until terminated by holders of the trust certificates. Issuance of these certificates was limited to the 3,270 members of the tribe whose names appeared on the final roll of the tribe as proclaimed on June 17, 1954.

4. *Individuals*. Plaintiffs, Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, are all enrolled members of the Menominee Tribe, and stockholders of MEI.

5. *Trustee*. Plaintiff, First Wisconsin Trust Company, is a corporation, duly organized and existing under the

laws of the State of Wisconsin, which was appointed trustee under the Menominee Assistance Trust to protect the rights of members of the tribe less than 18 years of age, *non compos mentis*, or otherwise incompetent. As trustee, it holds and [113] exercises the voting rights in MEI of those shareholders who are in its trust.

#### THE MENOMINEE RESERVATION

6. The Menominee Indian Reservation, the land where the tribe and most of its members presently reside, was for the most part aboriginally owned by the tribe, and was confirmed to the tribe by the Treaty of Wolf River, May 12, 1854, 10 Stat. 1064. This reservation was never allotted, and remained wholly owned by the tribe until conveyed in 1961 to MEI by the Secretary of the Interior pursuant to the Menominee Termination Act of 1954, 25 U.S.C. 891-902. It is an area in the State of Wisconsin consisting, as of June 17, 1954, of 233,902 acres of unallotted land along the upper Wolf River in northeastern Wisconsin. About 95 percent of the land is forest land which was placed under what was intended as a form of sustained yield timber management by the Act of June 12, 1890, 26 Stat. 146, and the Act of March 28, 1908, 35 Stat. 51. *Menominee Tribe of Indians v. United States*, 117 U.S. 442 at 485 (1956). The tribe held the land "as Indian lands are held" until 1961 when the defendant conveyed fee title by deed to MEI, pursuant to the Termination Act of 1954.

7. From 1854, and until the Termination Act of 1954 was implemented in 1961 by deed to MEI, the defendant held fee title to the Menominee Reservation in trust for the benefit of the tribe, and managed the affairs and properties of the Menominees. Until that deed of conveyance, defendant had the fiduciary duty of a trustee in regard to the plaintiffs, and accordingly was under obligation to act in such a manner as to safeguard the interests and

property of the tribe from the standpoint of the best interests of the tribe.

8. The deed by which the United States in 1961 conveyed its legal title in the Menominee Reservation to MEI, attached covenants or restrictions in the transfer of lands. These covenants or restrictions required in specific terms sustained yield management of the forest in perpetuity, and prohibited alienation or encumbrance of the lands for a period of 30 years from April 26, 1961. (See finding 34, *infra*.)

#### INTRODUCTORY FACTS

[114] 9. Prior to April 29, 1961, the effective date of termination of federal supervision over the Menominee tribe and over its members and its properties, the Menominees had a tribal organization recognized by the Secretary of the Interior as having authority to represent the tribe. After termination, there existed a Wisconsin corporation, named Menominee Indian Tribe of Wisconsin, Inc., over which the Secretary exercised no jurisdiction. As of 1954 the tribe had 3,270 enrolled members. On April 28, 1961, its members consisted of the enrolled members or their descendants. This court in *Menominee Tribe v. United States*, 179 Ct. Cl. 496 (1967), *aff'd* 391 U.S. 404 (1968), rejected the contention that the Termination Act of June 17, 1954, 68 Stat. 250, abolished the tribe or its membership.

10. The history of the tribe and its lands was authoritatively described by this court in the above-cited case at 179 Ct. Cl. 501-02, as follows:

The Menominee Indians have lived as a tribe since time immemorial in Wisconsin. They have made various treaties with the United States through the years, most of which have nothing to do with this present lawsuit. However, by way of background, we will point out that by the Treaty of St. Louis, 7 Stat. 153 (1817), they acknowledged themselves to be under the protection of the United States. The

Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundary questions, while by the Treaty of Washington, 7 Stat. 342 (1831), and 7 Stat. 405 (1832), they ceded 3 million acres to our Government. They ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836), and in 1848, ceded the balance of their land of approximately 4 million acres by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, in exchange for about 600,000 acres west of the Mississippi River.

As a part of this last treaty and exchange, it was agreed that they could inspect the land west [115] of the Mississippi before moving on it. They did so and reported dissatisfaction with it and refused to move to it. The Government then ceded them 276,480 acres of different land on the Wolf River in Wisconsin which was acceptable to them and to which they moved in 1852.

In order to legalize this exchange of land, the Treaty of 1848 was amended by the Treaty of Wolf River, 10 Stat. 1064, 1065 (1854), by which the Menominees ceded back to the Government the lands west of the Mississippi which they had refused to accept and in return the Government gave to them the reservation on the Wolf River "for a home, to be held as Indian lands are held, \* \* \*."

Except for two small tracts ceded by the Menominees in 1856, for use by the New York Indians, 11 Stat. 679, the Wolf River Reservation of about 230,000 acres has remained intact as the Menominee Reservation to the present time. It was occupied and governed by them according to the customs, laws, rules and regulations of the tribe without any outside interference by the state or anyone else during the 100 years from 1854 to 1954.

11. The plaintiffs have introduced into evidence a great deal of testamentary and documentary material supporting their basic contention that the defendant acted unfairly, prematurely and with insufficient study and preparation in terminating federal supervision over the Menominee Tribe with the result that plaintiffs were still in a fiduciary relationship to defendant and were therefore entitled to continuing supervision and protection during the 7-year period following enactment of the Termination Act and the effective date of its implementation; that the interests of defendant, as trustee, and of the State of Wisconsin, with which extensive negotiations were to be conducted, were in conflict with the economic interests of plaintiffs as wards of defendant; that as a result defendant did not discharge its fiduciary responsibilities to plaintiffs in the negotiations leading [116] to the conveyance of their land back to them; and that plaintiffs as wards could not effectively consent to the return of their land at greatly reduced value, nor could the subjects of this trust effectively consent to breach of the trust.

(a) The principal witness for plaintiff on these issues was Dr. Verne F. Ray, a highly qualified anthropologist and ethnohistorian, with extensive experience in the field of American Indians. Dr. Ray has published numerous books and articles in this field, and has made studies in depth of a number of specific tribes in addition to the Menominees, including the Coleville Tribe, the Yakima, the Chinook, the Klamath, the Apache Group in New Mexico and Texas, and others. He has been a professor in the Department of Anthropology at both the University of Washington where he held a deanship in the graduate school, and at Yale University, where he also served as Research Director, Human Relations Area Files, Inc., an organization of 16 American universities conducting social science research. He has been visiting professor at several other universities. Dr. Ray is pres-



ently a consulting anthropologist. The record supports the conclusion that Dr. Ray is extremely well qualified as an anthropologist and expert in the field of the American Indians, and specifically of the Menominee Tribe. He had studied the Menominees since 1930, and intensively for 3 years prior to trial of this case. In addition to his direct testimony, Dr. Ray also prepared a report which elaborates upon his findings and conclusions. The conclusions reached by Dr. Ray were based upon both extensive documentary evidence and information secured from discussions with a number of Menominee Indians corroborating the documentation.

(b) Plaintiff's other expert witnesses on this issue was Dr. Nancy O. Lurie. She is a highly qualified anthropologist, with an extensive background in American Indians, having received her doctorate in 1952. At the time she testified, Dr. Lurie was a full professor in the Department of Anthropology at the University of Wisconsin-Milwaukee, and had served as department chairman in 1967. She has also served as an assistant professor of anthropology at the University of Michigan, and has lectured at the University of Colorado and at the Rackham School of Graduate Studies at the University of Michigan. During the period 1965-66, she was a Fulbright-Hay lecturer of anthropology at the University of Aarhus in Denmark. She is an active member of many professional societies. [117] As an anthropologist and citizen of Wisconsin, she had for many years been interested in the Menominees, and in the issue of termination. She has done research and given testimony with respect to a number of American Indian tribes, and has spent a great deal of time among the Menominees. Dr. Lurie was not employed by the Menominees, but offered to testify on her own initiative, having concluded that as a scientist she should contribute any information that could be helpful on the issues in the case. Although Dr. Lurie submitted no report in addition to her oral testimony, as had Dr.



Ray, she did submit copies of her research printed in scientific journals and bearing upon the problems during termination. She had read Dr. Ray's report, and agreed with its facts and conclusions.

12. The Government offered no expert testimony or evidence in rebuttal.

### HISTORY OF TERMINATION

13. The Menominee Termination Act had its beginning in an investigation conducted by the Senate Committee on Civil Service in 1947, initiated to effect a reduction of the number of employees required by the Bureau of Indian Affairs.

14. William Zimmerman, Acting Commission of Indian Affairs, in response to a request from that committee for suggestions on how the personnel and expenses of the Indian Office could be reduced, presented as a solution a program for reducing its duties by the gradual withdrawal of federal control and supervision over Indian affairs. Mr. Zimmerman prepared a list of Indian groups, divided into three parts. "The first list includes these [Indian groups] which in my judgment could be denied Federal Services immediately or in the future whichever the Congress should decide." The second group included groups who should be able to function with a small degree or no federal supervision in 10 years, and the third group would require a longer period than 10 years. The 10-year period was an arbitrary figure.

15. In making up these groups, Zimmerman took the following four factors into account: (1) degree of acculturation (including such factors as admixture of white blood, percentage of illiteracy, business ability, acceptance of the Indians by whites in the community); (2) economic conditioning; (3) willingness to [118] dispense with federal aid; and (4) willingness and ability of the state in which the tribe is located to assume responsibili-

ties. Mr. Zimmerman proposed the early release of 10 tribes. The Menominee were included. This appraisal by the Bureau of Indian Affairs was made without any prior study or investigation. It was the opinion of the aforementioned experts, Drs. Ray and Lurie, that the Menominee did not meet any of the criteria for termination established by Mr. Zimmerman.

16. Later in 1947, Senator Butler of Nebraska introduced termination legislation, which failed of passage. On August 1, 1953, Congress by resolution (H.R.Con.Res. 108, 67 Stat. 3132) declared "termination" to be Government policy "at the earliest possible time." The Menominee Tribe was listed among the Indians covered by the resolution. It was declared to be the sense of Congress that all offices of the Bureau of Indian Affairs, the primary purpose of which was to serve any Indians freed from federal supervision, should be abolished. The Secretary of Interior was admonished to report not later than January 1, 1954, "his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution."

17. On July 13, 1951, the Menominee Tribe settled a 15-year litigation against the United States. The claim settled covered a variety of matters, including the ownership of certain swamp lands within the Menominee Reservation, which also were claimed by the State of Wisconsin; the Government's mismanagement of tribal funds; the mismanagement of the tribal forest, and the mismanagement of the tribal mills enterprise. The judgment awarded to the tribe was \$8,500,000 (*see* 49 Stat. 1085 § 1; *Menominee Tribe v. United States*, 119 Ct. Cl. 832 (1951)).

18. Congress appropriated the money to effect the settlement on November 1, 1951, and the funds were placed in the U.S. Treasury, to the credit of the tribe. However, the jurisdictional act under which the claims were heard

by this court (Section 7 of the Act of September 3, 1935, 49 Stat. 1085) prohibited a per capita distribution of any portion of the award. Individual members of the Menominee Tribe needed and wanted a per capita distribution of part of the award and the tribe sought Congressional approval for a partial distribution.

[119] 19. On February 9, 1953, then Congressman Melvin Laird of Wisconsin, introduced H.R. 2828 permitting distribution of \$1500 to each member of the Menominee Tribe. It was passed by the House.

20. On July 15, 1953, a Senate committee amended the Laird bill by striking its provisions and changing its purpose from permission for a per capita distribution, to providing "for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The \$1500 per capita distribution was retained only incidentally as Section 6 of the Senate termination bill.

21. The Menominee Tribe was aware of the possibility that a policy of termination might be adopted as a condition to its members obtaining the desired per capita distribution. Acting Commissioner of Indian Affairs, Erwin J. Utz as early as October 1951 told a meeting of the Advisory Council of the tribe that pressure was being applied in Congress to eliminate the Indian Bureau, and that it was generally believed that this would eventually happen. He advised the tribe to take cognizance of this trend in its planning. Council members stated they were aware of the Congressional trend but believed that the Menominees were not ready to take over their own affairs, stressing their need for additional time.

2. Senator Watkins of Utah had sponsored and managed the above-described Senate amendment which passed the Senate July 24, 1953. Thereafter in conference it was the Senate version which was substantially adopted.

23. The House conferees were of the opinion that the Senate version accomplished the purposes of House Concurrent Resolution 108, as outlined in finding 16 *supra*. After extensive conferences and hearings, the Menominee Termination Act (P.L. 399, 83rd Cong.) became law on June 17, 1954.

24. Pursuant to Section 3 of the Act, the Secretary of the Interior approved and published the final membership roll of the tribe in the *Federal Register*. It consisted of 3,270 names.

25. Pursuant to the Act, final termination of federal supervision was accomplished by Proclamation of the Secretary [120] of the Interior on April 29, 1961 (26 Fed. Reg. 3726).

#### PRINCIPAL PROVISIONS OF THE TERMINATION ACT, AS AMENDED

26. The Menominee Termination Act contained the following key provisions:

(a) The rolls of the tribe were closed as of June 17, 1954. Thereafter the rights or beneficial interests of enrolled persons were to constitute personal property. (Section 3).

(b) The Secretary of the Interior was directed to make a \$1500 per capita distribution to each enrolled member. (Section 5).

(c) The tribe was authorized to retain at its own expense, under contracts approved by the Secretary, the services of management specialists to assist in studies, recommendations and reports as necessary to carry out the terms of the Act, said action to be completed by December 31, 1957. (Section 6).

(d) The tribe was required to prepare a plan or plans for future control of tribal property and service functions on the reservation. The assistance was offered if requested. (Section 7).

(e) Unless an earlier date was agreed upon by the Secretary and the tribe, the responsibility of the United States on the reservation was to terminate December 31, 1958.

(f) On that date, the Secretary was to transfer to the tribe all property theretofore held in trust for the tribe. (Section 8).

(g) The initial distribution of assets under the Act would be exempt from federal and state income taxes. (Section 9).

(h) With transfer of property to the tribe, all federal services to the tribe and its members as Indians would cease, and all federal laws which affect Indians as Indians, would cease to be applicable to the Menominees who [121] would thereafter be subject to state laws. (Section 10).

(i) The interests of minors and legal incompetents were to be protected by the Secretary by such means as he deemed adequate. (Section 11).

(j) The Secretary was authorized to promulgate such rules and regulations as necessary to perpetuate the purposes of the Act.

27. The Menominee Termination Act was amended on four occasions during subsequent sessions of Congress:

(a) The Act of July 14, 1956, 70 Stat. 544, authorized reimbursement to the tribe for funds expended in the retention of services of qualified management specialists, tax consultants, etc., or "for any other expenditure of tribal funds approved by the Secretary for the purpose of carrying out the purposes of this Act."

(b) The Act of July 14, 1956, 70 Stat. 549 also made these changes in the basic Act:

(1) It required that the final plan to be formulated by the tribe must be submitted to the Secretary by December 31, 1957 and,

(2) That the tribe's plan must contain provision for protection of the forest on a sustained yield basis, and assure protection of the water, soil and wildlife. The Act stated in this regard:

The sustained yield management requirement contained in this Act \* \* \* shall not be construed by any court to impose a financial liability on the United States.

The intent of the quoted sentence is an issue in this case.

(c) The Act of July 2, 1958, 72 Stat. 290, postponed the date for submission of the tribal plan from December 31, 1957 to February 1, 1959, and postponed the final termination date from December 31, 1958 to December 31, 1960. It appropriated an amount to reimburse the tribe in part for its prior [122] expenditures of tribal funds to carry out the purposes of the Act, plus one-half of such expenditures incurred thereafter, or \$275,000, whichever was the lesser amount. This amendment also provided that if the tribe failed to submit an approvable plan for termination by February 1, 1959, the Secretary of the Interior would cause such a plan to be prepared. If the Secretary could not get tribal agreement to his plan within 6 months, he was authorized to transfer tribal property to a trustee of his choice for "management or disposition" for the benefit of the tribe.

(d) The Act of September 8, 1960, 74 Stat. 867, extended the termination date to April 30, 1961, but provided that the Secretary must transfer tribal property to a trustee of his choice on March 1, 1961 if a tribal corporation was not functioning by that date.



MENOMINEE COUNTY AND MENOMINEE  
ENTERPRISES, INC.

28. On January 26, 1959, pursuant to Section 7 of the Termination Act, as amended, the Menominee Tribe submitted its plan to the Secretary of the Interior contingent upon (among other things) necessary action by the legislature of the State of Wisconsin. The basic plan, revised after negotiations with federal and state officials and the passage of the necessary state legislation, was approved by the Secretary, in principle, on October 30, 1959. After certain editing, it was finally approved January 6, 1961, and published in the *Federal Register* on April 29, 1961. Under the plan as implemented by state statutes, the Menominee Reservation became both Menominee County and the Town of Menominee within the State of Wisconsin, with some town and county officials serving in the same capacity for both governmental entities. Menominee County was attached to adjacent Shawano County for judicial functions, and for the purpose of office and functions of the county Superintendent of Schools.

29. A Wisconsin Corporation, Menominee Enterprises, Inc. (MEI) was incorporated under state laws to accept title to and manage all property and assets of the Menominee Tribe, the stock to be held and managed by a voting trust for the benefit of all stockholders issued voting trust certificates. The corporation had an authorized capital stock of 330,000 shares, par value \$1.00 per share. Trust certificates representing [123] 100 shares of stock were issued to each of the 3,270 enrolled Menominees, except that the certificates of minors or incompetents were issued to the First Wisconsin Trust Company to be held for their benefit. Transferability of the trust certificates was restricted. An income bond at a par value of \$3,000 was to be issued to each of the 3,270 enrolled members (or for their benefit to the First Wisconsin Trust Company).

30. The income bonds issued by MEI to its shareholders bearing 4 percent interest if earned, could be used at par value by the members of the Menominee Tribe for purchase of homestead or farm property from the corporation. They could not be sold for a period of 3 years, but in the meantime could be pledged for loans. After the 3-year period, the corporation had the option to meet bona fide offers for the bonds.

31. By its Articles of Incorporation and By-laws, MEI was vested with authority to "manage and operate all of the business and property, real and personal, transferred to the corporation by the United States of America," pursuant to the Termination Act; to issue 330,000 shares of \$1.00 par value common stock, with the right to restrict sale of stock.

32. The Articles of Incorporation of MEI as established in 1961 provide that the corporation is authorized to purchase shares of its own stock or voting trust certificates without vote of shareholders and without regard to the availability of unreserved and unrestricted earned surplus equal to the cost of such shares; that the corporation is bound to operate the Menominee Forest on a sustained yield basis, but is authorized to determine what small area of land should be designated forest lands, or removed from such designation, to eliminate from the forest restrictions small tracts found more useful for recreational or residential rather than forest purposes; that the requirement that forest lands shall be operated on a sustained yield basis is not subject to deletion by amendment unless expressly permitted by the Congress of the United States; that the corporation has no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation unless so authorized by an affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon; that it is authorized however to mortgage or pledge corporate assets for the pur-

pose of borrowing in an amount not [124] exceeding \$250,000, to lease the lands not designated as forest lands, or to sell or convey to individuals who were enrolled tribal members or their heirs at law, individual parcels in the aggregate not to exceed 14,500 acres for homesites, agricultural use or other development lands not designated as forest lands.

33. The business and affairs of the corporation were to be managed by its Board of Directors, consisting of nine members. At the first election, three were elected for a term to expire at the first annual meeting of shareholders after their election, the second class of three for a term to expire at the second annual meeting after their election, and the third class of three for a term to expire at the third annual meeting after their election. A minimum of four directors, including at least one member of each class, were required to be members of the Menominee Indian Tribe of Wisconsin whose names appeared on the final roll, or had to be blood descendants of such members. Directors were not required to be residents of the State of Wisconsin. Provision was made to prevent directors from also serving as trustees under the voting trust, or as a member of the County Board of Menominee County or the town board. The corporate by-laws were later amended to provide for 12 directors.

34. On April 26, 1961, the Secretary of the Interior transferred to MEI, title to the real property held by it in trust for the Menominee Tribe. Pursuant to the above-described amendment accomplished by the Act of July 14, 1956, 70 Stat. 549, providing that the plan must contain a general provision for sustained yield management of the tribal forest, and as a result of a corresponding and specific state statute (Ch. 258, Laws of 1959) providing a new method of taxation of forest lands required by federal law to be operated on a sustained yield basis, the deed transferring the Menominee Forest lands to MEI contained the following restrictive language:

\* \* \* THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:

1. That the lands conveyed hereby shall be operated on a sustained yield basis until released therefrom under the laws of Wisconsin or by act of Congress.

[125] 2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

35. An appraisal of the tangible property by tax appraisers of the State of Wisconsin valued the Menominee Forest at about \$30 million based on stumpage prices, and it valued other Menominee property at about \$4 million. For tax purposes, the Wisconsin legislature valued the forest at 40 percent of its full value, *i.e.*, approximately \$12 million.

#### OPPOSITION OF THE MENOMINEES TO TERMINATION

36. Earlier findings have dealt with the conversion of Congressman Laird's proposal for a \$1500 per capita payment to each member of the Menominee Tribe, into the Menominee Termination Act. When the Laird bill (H.R. 2828, February 9, 1953) reached the Senate Subcommittee on Indian Affairs, it was initially held up by the Chairman, Arthur V. Watkins of Utah. As early as 1947, Senator Watkins had held subcommittee hearings on the withdrawal of federal services and protection from Indian tribes, although no legislation resulted at that time. Senator Watkins had developed a strong and continuing position in favor of termination and his views

were forcefully expressed at the subcommittee hearings which he chaired. Senator Watkins equated "termination" with "freeing the Indians," and referred to the termination program as a "freedom program." The Senator also characterized termination of federal supervision as "Removal of Restrictions Over Indian Property and Person." As later found, the claims herein are concerned in part with the imposition of restrictions on plaintiffs' property, restrictions thereafter imposed under state rather than federal administration. The Commissioner of Indian Affairs similarly referred to the termination program as a "readjustment program," avoiding the use of the word "termination."

37. Thereafter, the Laird bill which had dealt solely with a per capita distribution to the Menominees, was rewritten [126] primarily as a termination bill, the proposed revisions being worked out with the Bureau of Indian Affairs.

38. On June 20, 1953, Senator Watkins visited the Menominee Reservation where he spoke at a meeting of the Menominee General Council. He made it clear on that occasion that the tribal members would be denied the \$1500 per capita distribution they sought from their own tribal funds unless they agreed to full and unqualified elimination of federal protection, services, and privileges, and took their place in the Wisconsin state governmental system on a full and equal basis with non-Indians.

39. The foregoing was confirmed by Congressman Henry S. Reuss during later subcommittee hearings at which he stated:

\* \* \* On several occasions the Tribe was told by representatives of the Federal Government that unless they agreed to termination on the Federal Government's terms, they could not have the \$1500 made available to them and to their credit in the U.S. Treasury. That proposition was put to the Tribe at

the Department of the Interior in the office of then Assistant Secretary of the Interior Orme Lewis at a meeting on June 5, 1953. It was also repeatedly put to the Tribe at a meeting on the Reservation in Wisconsin on June 20, 1953 by the Honorable Arthur Watkins, the Senator from Utah, who was then Chairman of the Senate Subcommittee on Indian Affairs.

40. Following Senator Watkins' speech the Menominee men and women present at the General Council meeting voted 169 to 5 (in a standing vote) to accept the principle of termination. No plan of any kind or any specifications for termination had been presented to them, nor had they [127] been advised of the many personal, economic and political consequences which would flow from termination. It had been made clear that the per capita distribution which they wanted was inextricably linked to termination, and that a vote against termination was a vote against a per capita distribution.

41. Within a month after Senator Watkins appeared before the General Council meeting following which the above tribal vote was taken, the acting chairman of the Advisory Council called another meeting and urged all tribal members to attend. The chairman had become alarmed upon learning all of the implications of the Watkins bill, and had conveyed his concern to the rest of the membership. Because of the requirement for a 10-day notice, the meeting could not be characterized as a regular General Council meeting, but the attendance was one of the largest ever experienced on the reservation, over 200. Due to the nature of the meeting only the Advisory Council members could register an official vote. However, in accordance with frequent practice, the Advisory Council called on all the assembled tribal members for a vote, thus achieving the equivalent of a General Council meeting except for the manner in which the vote was recorded in the minutes. The question presented was: If you favor



rejection of termination now even though it means that you will *not* receive a per capita payment from the tribal funds, please stand. One hundred ninety-seven stood, and none opposed rejection of termination. This vote was brought to the attention of Congress in the course of the joint hearings on termination, but had no influence on the course of the termination legislation.

42. On March 10, 1954, the Joint Committee on Indian Affairs met on the question of Menominee termination and conducted 3 days of hearings. On the third day Senator Watkins was the only one present on behalf of the joint subcommittee. In a conference following the hearings it was the Watkins bill which was essentially adopted. The House rejected the conference report and further conferences were required but the bill that reached the Congress was the Watkins bill with a modification of the time schedule to provide that the final withdrawal of federal services should occur on December 31, 1958 rather than December 31, 1956 as originally provided. As earlier described, the Congress passed this [128] bill in early June, and it was signed by the President on June 17, 1954. Subsequent amendments postponed the effective termination date to April 30, 1961.

43. A considerable amount of opposition to termination was expressed by prominent Government officials and social scientists who had observed the reaction of the Menominees. Congressman Reuss of Wisconsin testified before the Indian Subcommittee of the House:

The Termination Bill is defective, in my opinion  
 \* \* \* it was not consented to by the Tribe, and it  
 does not provide for the Tribe's consent for its future  
 governance from now to eternity. \* \* \*

The Superintendent of the Menominee Reservation for the Indian Bureau wrote the Commissioner of Indian Affairs on December 10, 1954 that:

\* \* \* [T]he Menominees, or at least their leaders, are violently opposed to withdrawal and have repeatedly stated in meetings "The Government and Congress want withdrawal, now let them do it as we don't want any part of it." The record here is clear as to what we [the Bureau of Indian Affairs] had done and attempted to do in carrying out the policy of the Bureau in regards to withdrawal. [And on Feb. 1, 1955] I question very much whether we are going to be able to "Sell" the Menominees on the Withdrawal Program.

Bureau Program and Administrative Officer R. W. Quinn reported that:

\* \* \* [W]e are experiencing non-acceptance, resistance and a considerable bewilderment, irritation and conflict among the Menominee people. The mental state of the people is contrastingly different than you would expect from a group with their reputation \* \* \* they have never had to carry the day to day management work load. Government employees carried this load.

\* \* \* \* \*

Almost no one wants withdrawal and most are seriously confused.

\* \* \* \* \*

[129] On major issues negative to withdrawal it is safe to say that the Advisory Council would have little trouble rallying all groups.

The demand for per capita payments and independence from the Advisory Council and from the Agency does not indicate an actual desire or conviction of their readiness for withdrawal, it's a demand for their "fair share" which they don't think they'll get otherwise.

The chairman of the Menominee Advisory Council wrote that "[w]e all know that there will be a movement \* \* \* to ask the new Federal administration and the Congress to reconsider the advisability of termination."

44. A political scientist, Dr. Gary Orfield, wrote that:

In 1953, Watkins secured Senate passage of a harsh termination bill. Many Menominees saw the issue as either accepting the Watkins bill in the next session or submitting a substitute measure more favorable to the tribe. At this time, no one in the tribe had the faintest idea of the implications of termination.

Dr. Orfield also pointed out that in its description of the action by the tribe during subsequent Congressional hearings:

The BIA made no explanation of the context within which the tribe had voted. The decision of 200 people [actually, only 174] who needed money, who were told that termination was coming anyway, and who hadn't the least understanding of the implications of termination, was taken as the considered judgment of the entire tribe.

\* \* \* \* \*

He concluded that:

[130] There is no evidence that the majority of the Menominee people favored termination at any time.

\* \* \* \* \*

The termination act was based on a series of false assumptions. \* \* \*

45. Dr. David W. Ames, an anthropologist sent to the reservation by the State of Wisconsin, later wrote that Senator Watkins—

\* \* \* made it clear that there would be no per capita payment unless the tribe accepted federal withdrawal. One hundred and sixty-nine tribal members voted in

favor of the principle of termination; 5 voted against it. This group could hardly be representative of the much larger total enrolled adult membership of the tribe; one wonders why there was no call for tribal referendum on a decision of such importance.

Though the tribe "officially" voted for the principle of termination, the Menominees made it clear early in the negotiations that they disapproved of the way it was to be carried out, especially in regard to timing. They voted against the Watkins bill in two subsequent General Councils and established a planning commission to devise their own termination legislation and plans.

\* \* \* \* \*

Some Menominee later explained that they voted for termination because they were "tempted" by the large sum of money involved in the per capita payment. \* \* \* Most Menominees I have spoken with say \* \* \* that the per capita payment was an "out-right bribe" or "stick" by which they were "forced" to accept termination. When it is argued that the tribe had responsibility in that its members permitted themselves to be "bribed", the reply is that it was difficult to behave otherwise in the economic and social circumstances of the average reservation adults. \* \* \*

46. Dr. Robert B. Edgerton, who spent the summer of [131] 1959 on the Menominee Reservation, noted that:

\* \* \* [N]o tribal referendum was called [on the question of termination]. [And out of a Menominee population of about 3,100 enrolled members,] [o]ne of the most important issues ever to be considered by the tribe was settled by 174 people. \* \* \*

\* \* \* [T]he Menominees were faced with the necessity of submitting a termination plan acceptable to the Secretary of the Interior \* \* \* or having the Sec-

retary draw his own plan and turn over tribal lands and funds to a trustee of his own selection. Very few Menominees understood these alternatives; most knew only that termination was coming unless they did something to stop it and they felt powerless to find that something. The reservation was in turmoil, and \* \* \* there was an almost universal concern with the approaching reality of termination.

\* \* \* \* \*

Many Menominees are completely ignorant of the meaning of termination. \* \* \*

There is no doubt that the great majority of Menominees was opposed to termination in the summer of 1959. \* \* \*

Similarly, the Secretary of the Interior in 1958 declared that no tribe would be terminated unless a clear majority of its members agreed. He noted that a clear majority of the Menominee Indians neither accepts nor understands termination, and queried how it was possible for termination to come to an Indian people without a tribal referendum.

47. The earlier mentioned Dr. Ray, plaintiffs' expert witness at trial, stated in his report:

[The acceptance of the Watkins bill was in part a reflection of a conviction that termination was inevitable, but there was also the feeling that rejection of the bill currently offered would [132] result in a much less acceptable or favorable bill being presented in a near future session of the Congress with passage of such a bill further detrimental to the Menominee tribe.]

48. Although the opposition of the Menominee Tribe to the concept of termination appeared, at times, to be directed more toward the short time frame in which it was to be accomplished, rather than toward the concept

itself, it is clear that the opposition of the tribal members was fundamental. That opposition was effectively neutralized prior to passage of termination legislation by the statements and actions of Senator Watkins; by the need of the tribal members for the per capita distribution; by misunderstandings as to the full implications of termination; and by the innocent conviction that if termination when tried proved undesirable, it would be repealed. With respect to the last factor, Program Officer Quinn noted that:

The general feeling is that \* \* \* [State and University] studies will uncover facts which will only prove that the entire withdrawal proposition is unrealistic in terms of the immediate future.

49. Later, when the character and practical implications of termination came to be better understood, tribal opposition intensified. The feeling against termination was so strong in 1960 that the Menominee Tribe repudiated its leaders and charged them with failure to stop termination and return the Menominee to federal supervision. Shortly thereafter, a petition was circulated and signed by 600 tribal members asking for outright repeal of the Termination Act. The reaction of many members was to boycott tribal meetings. They believed that their non-attendance would prevent termination from actually occurring, since non-attendance was "a traditional expression of negative opinion even to meeting for discussion on a matter."

50. The State of Wisconsin, which was also strongly opposed to termination, encouraged the Menominee Tribe in its continuing opposition and took legislative action to stop termination. Within days of the final termination deadline the legislature unanimously approved a resolution requesting repeal. Contending that tribal assent had been "obtained by [133] duress" the resolution provided:

Resolved by the senate [the assembly concurring],  
That the legislature of the State of Wisconsin re-



quests the Congress of the United States to repeal or amend Public Law 399 \* \* \* so as to retain and continue indefinitely federal supervision \* \* \* until such time as the Menominee Indian Tribe has achieved a status comparable and equal to the average citizen of the environs \* \* \* and until the tribe has initiated a request for termination of tribal status and such request has been approved by an official vote of the enrolled members of the tribe. \* \* \*

51. In response to a question as to why the Menominee Tribe was selected for termination the above mentioned Dr. Ray responded:

Well, the Menominee Tribe was selected for Termination, I think, for some reasons that I have already mentioned, the fact that they were listed by the Bureau of Indian Affairs in 1947 and 1953 as being a tribe that might immediately be terminated because the Menominee Tribe had just recently won an \$8½ million judgment from the United States for mismanagement, because this recovery added to what they had in their treasury brought the total up to over \$10 million, because superficially it might appear—because superficially it appeared that the Menominee Tribe were in a more acculturated condition than in fact they were, because of the actions of Senator Watkins, both in terms of his deeply felt conviction that all American tribes should be terminated as soon as possible, and that the Menominees should be one of the first, together with his actual handling of the matters concerning Termination in the Subcommittee on Indian Affairs, of which he was the Chairman, and his very forceful presentation to his colleagues of his views on Termination.

Because of these factors, I think the Menominee Tribe was selected.

In his statement to the Menominees Senator Watkins had [134] said:

You had a just complaint and you brought suit against the United States, and one of the complaints was that the United States mismanaged your lands and property to the extent that you suffered damages in the amount of \$8,500,000; \* \* \*

[I]t would be good to get rid of Uncle Sam because he cannot possibly do the job.

INADEQUACY OF MEASURES TAKEN TO PREPARE THE  
MENOMINEES FOR TERMINATION, AND MANAGEMENT  
OF THEIR OWN AFFAIRS

52. Termination was proposed and enacted without prior consideration and study of how it was to be implemented.

After the passage of the Act, it became obvious that comprehensive studies would have to be conducted to determine whether or not Menominees were prepared to carry out the responsibilities to be assumed by them and how they were to be prepared to assume those responsibilities. However, these studies were not initiated until over a year following passage of the Act. By 1956, Congressman Reuss was citing the danger to the Menominee Forest which termination had brought about. He also referred to the tax problem confronting the Menominees. He had the impression, for example, that the annual net income of the Menominee Tribe would be \$400,000, and its annual tax bill \$800,000. He was also alarmed by the provision in the termination legislation that the Menominee Tribe would be as he put it "shoved out on an out-you-go-ready-or-not basis" whether or not an acceptable plan could be devised during the 4 years allotted for after-the-fact study.

53. In June 1955, William Zimmerman, Jr., who had been Acting Commissioner of Indian Affairs in 1947 when the termination policy was initiated, declared that: "Bureau officials, including the Superintendent, frequently

failed to inform tribal officials when plans were being considered and adopted by the Bureau." He also pointed out that problems arising after passage of the Act, such as hunting and fishing rights and the status of the tribal court, had not been explored. Other problem areas resulting from lack of prior study, were stumpage payments, and the fate of tribal enterprises such as [135] the hospital, welfare payments, and conduct of the schools.

54. In September 1955, Glenn L. Emmons, the Commissioner of Indian Affairs, writing to the Attorney General of Wisconsin, agreed that:

[D]ifficult and complex problems confront the Menominee Tribe \* \* \*, that solutions to these problems cannot be developed without extensive research, and that very considerable effort must be extended jointly by the tribe, the Department of Interior, and the State of Wisconsin and its local governments in achieving those solutions.

Commissioner Emmons then alluded to the contract with the Wisconsin State Department of Public Instruction which provided for an adult educational program:

[T]o help the members of the tribe to earn a livelihood to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians.

In this this letter Commissioner Emmons continued:

Over the years the Indian Bureau staff has assembled substantial data and familiarity pertaining to Menominee resources and society \* \* \*. These efforts will be continued and we expect them to intensify [sic] \* \* \* [W]e will provide every reasonable assistance within the limits of facilities and funds available to us.

In the years that followed, these data and this assistance were not forthcoming.

55. Necessary studies were left to the Menominess or to the State of Wisconsin. In this respect James G. Frechett, Chairman of the Menominee Indian Advisory Council, stated:

\* \* \* [T]he Indian office in its administration of the Menominee withdrawal legislation has definitely defined a policy which throws the entire [136] responsibility for any affirmative action or planning directly in the laps of some thousand-odd adult Menominee Indians who, over the past century, have been closely supervised, directed, and controlled by the Bureau of Indian Affairs; whose thoughts, desires, and recommendations to the Bureau of Indian Affairs in the past, with respect to their own economy, were by and large ignored; and on the other hand, all directions came affirmatively from the Bureau. Under a century of such wardship and control, it was only a natural end-result to look to, and lean upon, the federal government. This immediate breaking-off from such control and jurisdiction is, therefore, breath-taking and terrifically demoralizing.

\* \* \* \* \*

The Bureau places upon our shoulders the affirmative responsibility to take care of matters locally and then, in the next breath, tells us we have no authority to do what needs to be done.

\* \* \* \* \*

It must be remembered that the leaders of our tribe who grasp these problems and understand them are family men with family responsibilities and private employment responsibilities, and all of these things must be done on their own time when they are not working for a livelihood.

56. Others also commented on this policy of the Bureau of Indian Affairs. Dr. Gary Orfield concluded:

From the outset, the Bureau of Indian Affairs made clear its intention to hold the tribe responsible both for the necessary research and for the decisions determining the form of organization to be created after termination. Six months after the bill was passed, the Bureau cut its local staff by over 50 percent and began to transfer functions to the Advisory Council. \* \* \*

With the added workload, the remaining local agency employees of the Bureau were unable to give attention to Menominee needs for studies and planning, even apart from the effect of the locally enunciated policy to provide [137] reasonable assistance if requested. The result was that the tribe received very little meaningful assistance from the Bureau.

57. During 1955, the earlier-mentioned local agency employee, Program Officer R. W. Quinn, recognized the problems flowing from termination, but he was without authority, staff, or funds to meet those problems. He observed in a memorandum of January 31, 1955, that the Menominee situation was confusing and he characterized their reaction as one exhibiting a "high degree of anxiety," together with "bewilderment, irritation and conflict." An attitude of non-acceptance and resistance, not characteristic of the tribe, had developed. The problems growing out of termination, as they developed, were beyond the comprehension of the tribe. Mr. Quinn prepared an analysis in which he expressed the need for diagnosis by "people expertly trained in the field of social science. So far I have not been able to find much evidence of those kind of studies made on the Menominee Reservation." In his opinion, more than "administrative skill" was required, namely, "sound social studies." He concluded that the Termination Act placed the burden of responsibility of preparing themselves for termination on the Menominees and that "if the cost of these studies are to be paid for from tribal funds that very likely they will not be made."

58. Dr. Ray, plaintiffs' expert witness, notes that the foregoing obviously constituted knowledge and notice within the Government that in-depth studies were needed. The Commissioner of Indian Affairs, however, dismissed this advice from the local program officer with the statement that funds available for that type of research had already been obligated for fiscal year 1956, and with the opinion that necessary training of the Menominees in their responsibilities of citizenship and for the transition that they must make could be accomplished by an "adult education program." Similarly, Dr. Lurie testified that the Government was aware of the science of applied anthropology in aiding groups forced to accept cultural concepts other than their own, and had in fact established an anthropological division in the Bureau of Indian Affairs as early as 1935. The Society for Applied Anthropology had been established around 1944 based on experience gained within Government both at the Indian Bureau and elsewhere during World War II. Anthropologists had specifically testified and spoken publicly on the dangers and difficulties attendant upon a policy of termination of federal trusteeship over Indians.

59. In 1957 a Menominee Indian Study Committee created [138] by the Wisconsin legislature expressed concern regarding the absence of data necessary for decisions on social, civil and governmental service needs of the Menominees, and in 1960 just before termination became effective, the tribe was still asking for a Congressional team to study termination problems and to "appraise the actual situation of this Tribe."

60. Necessary studies had not been made prior to the enactment of termination, and the tribe which would have been the subject of such studies, was certainly in no position to know the research techniques necessary to initiate studies directed toward themselves. The aforementioned state-sponsored Menominee Indian Study Committee (MISC) was not established until 1955 and therefore did



not hold its first meeting until a year after passage of the Menominee Termination Act. Its research was therefore not directed toward whether or not termination should take place, but what to do about it, assuming termination to be an accomplished fact.

61. MISC had been created by Joint Resolution of the Wisconsin legislature as the result of a request for help directed to the State of Wisconsin and its university by the Menominee Advisory Council. The 14-member committee consisted of three members of the tribe, representatives of each of the two counties within which the reservation was contained, six members representing the state's departments concerned with taxation, public welfare, public instruction, highways and conservation, one State Senator, two Assemblymen, and the State Attorney General. Its job was to study the transition problems and to develop specific recommendations and legislative proposals to the Joint Legislative Council, so as to permit the introduction of necessary bills during the 1957 legislative session. The studies of this state-sponsored committee were in part financed by tribal funds.

62. The state legislature eventually adopted a series of statutes, creating a Menominee County, coterminous with the Menominee Reservation, and transferring the tribe and its activities from federal to state auspices. These state laws were to be effective on the date of publication of the termination plan in the *Federal Register* (which occurred April 29, 1961), but *only* if that plan required a covenant in the deed of the forest lands to be conveyed by the United States, [139] restricting any subsequent transfer of ownership or encumbrance of said lands for a period of 30 years thereafter (subject to certain exceptions).

63. MISC relied heavily upon the faculty of the University of Wisconsin to supply it with basic research. The university assigned David Ames, an anthropologist, to take up residence on the reservation and to undertake a thorough independent study of the social aspects in-

volved in termination. The Wisconsin-Michigan section of the Society of American Foresters offered to assist in studies of the forest.

64. Dr. Ray observed that MISC, being a state committee, was state-oriented and that it was furthermore handicapped by the fact that its studies did not precede termination and therefore could not be directed to the basic question of whether or not termination was advisable at all. Although well-intentioned, the committee members examined the Menominee problems—

within the confines of their customary governmental operations in which they considered the Menominee, who constituted less than one per cent of the state's population, as not holding any special rights by virtue of treaty provisions or trust status.

Dr. Ray further reported that little was accomplished by MISC because it was constituted to ignore the human factors and social problems of termination in favor of the pragmatic consideration of legal, governmental business, forestry and agricultural problems with the interests of the state paramount. Furthermore, the anticipated help from the university faculty was handicapped by the fact that faculty members had classroom teaching and other duties to discharge. MISC did not view its mission as one of developing a termination plan for the tribe. Rather it collected data and presented that data to the tribe for whatever disposition it chose. The chairman of the University Advisory Committee stated that "[t]he job of the Menominee Indian Study Committee was to keep the heat on the Tribe to come to their own decision."

[140] Dr. Ray concluded:

That the professionals should have thought the Menominee capable of solving problems which they, themselves, found to be of "extraordinary complexity" was remarkably naive, and considerably reduced the value of the efforts given to Menominee studies.

Only when the interests of the state were paramount did the committee make, and stand behind, firm recommendations.

As evidence of this, MISC subsequently reported that:

Failure to evolve a satisfactory plan [for termination of the Menominee Tribe] would result in disaster as to the best interest of the State of Wisconsin.

65. On October 3, 1957, the chairman of the University Advisory Committee wrote the chairman of the Menominee Advisory Council, urging that it was the council's responsibility to carry out all studies on termination problems, and advising against the tribe's setting up its own study committee. However, the council was not equipped to carry on such studies. As a result, the tribe organized its own special study group, named the Coordinating and Negotiating Committee.

66. In February 1959, MISC turned its attention to the omnibus plan which the tribe had supplied. The chairman of MISC, Attorney General Reynolds, gave the numerous committee consultants 2 weeks to prepare and dispatch their comments. The final meeting of MISC was held on April 21-24, 1959, at which time the subcommittees, including the University Advisory Committee, submitted their reports on the omnibus plan. Spokesmen for the university and state committees explained that:

The omnibus plan is large and complex \* \* \* the issues and problems many. \* \* \* We must frankly confess to have done little better than to have skimmed the surface on these problems.

67. The Menominees evaluated the studies of the state [141] committees and found them to be of little help in resolving the termination problems they faced. Chairman James Frechette recorded his concern as follows:

In evaluating the studies \* \* \* we come to the conclusion that in some fields of research the University

may \* \* \* be limited either in personnel available or research materials, that would make it necessary for us to seek this information in specialized fields. \* \* \*

No specialized research facilities were, however, developed by the United States, the State of Wisconsin, or the tribe.

68. It was left to the aforementioned Coordinating and Negotiating Committee, salaried employees of the tribe, to prepare and complete the final tribal plan required by the Termination Act. Their plan was presented to and approved by the Menominee General Council on January 17, 1959. The committee's chairman was of the opinion that:

None of these studies (by the University) had conclusions or a blueprint. Essentially they put into writing what everyone already knew. Action was left entirely to the tribe.

He further concluded that the so-called "Adult Education Program" designed to prepare the Menominees for termination, was not achieving that purpose because:

\* \* \* [T]he large majority of the people were not able to absorb the material being brought to them, they were not able to translate it to real meaning because they had not had the base of experience or training necessary to understand the material and so had dropped out of the classes, which dwelt on the forms and responsibilities of state and county government and business organization. I found that the basis of the material being given to them was fixed in the Wisconsin law on governmental structure, and the general law on business organization. I read all the available material developed and [142] found no exposition of the impact or full meaning of Public Law 399 in all its implications with respect thereto. The people simply did not understand. The Adult Education Program instructor has admitted to questioners that Public Law 399 is too complex for him to

interpret. \* \* \* [T]he Bureau of Indian Affairs and the Department of the Interior have offered no recommendations. The Menominee Study Committee and the University staff assistants have made prodigious studies and have laid out perspectives, but have left decisions to the Tribe without recommendations.

69. Dr. Ray concluded on the basis of the foregoing that defendant, after requiring involuntary termination, thereafter abdicated its responsibilities to prepare the Menominees for termination. The state's substituted efforts were inadequate, leaving the tribe, which had theretofore been cared for under a trust relationship, with the responsibility of preparing itself, although its members lacked the necessary training and sophistication in social, economic and governmental affairs. Rather than offering increased assistance, the Indian Bureau began to withdraw services which it had been providing prior to enactment of termination. He lauded the work accomplished by the Coordinating and Negotiating Committee finally established by the tribe, largely because of the presence on that committee of Mr. George Kenote who had left the reservation many years before to work for the Bureau of Indian Affairs, and who had 28 years of service with the Bureau. Mr. Kenote wrote most of the committee reports on which final action was based, so that the Menominees:

[H]ad benefit of the services of only one man with the training and insight that could and should have been provided by the United States, in research teams, as a minimal contribution to the termination program, which it had demanded and achieved for its own benefit. Instead, the tribe had the services of this one man only by hiring him to leave his specialized activities in the Bureau of Indian Affairs for a time, thus providing his talents to the Menominee people.

\* \* \* \* \*



\* \* \* The state tried to compensate for the federal [143] government's dereliction, but failed. The tribe succeeded in formulating a plan acceptable to the United States but it was a defective plan. Had the United States properly carried out its obligation, as initiator of the idea of termination and as trustee for the tribe, its far greater competence in research and analysis would undoubtedly have resulted in complete abandonment of the termination project.

70. The Menominees were, in effect, "in the middle" and left largely to their own devices in dealing with federal and state governments, neither of which was prepared nor disposed to treat with the problems of termination confronting the Menominees, other than from the standpoint of federal or state problems. By way of illustration, the Secretary of the Interior on July 16, 1959 when the Menominees were still under federal supervision and protection, sent the following telegram to the Menominee Advisory Council:

Reurtel July 9 concerning state legislative proposal for thirty year restrictive covenant on sale Menominee Forest property, we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens. In answer your specific query does Secretary have right to do this, we believe we can but would do so reluctantly only because you appeal that it is only way Menominees can get state legislation they want. Also it is in \* \* accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale covenant in the deed provided Menominees give their consent, \* \* \*.

There is no evidence that defendant assisted the Menominees in resisting the state's requirements. Instead the Secretary of the Interior took the position that:



Certainly in areas of preponderant State of Wisconsin concern, where the Tribe and the State can agree, it is very likely that we can feel that those elements of the plan are approvable. \* \* \*

[144] 71. On the other hand, as Dr. Gary Orfield concluded from a review of the minutes of the state-sponsored MISC:

Members of the Menominee Indian Study Committee did not believe that it was their function to prepare a definite plan for the tribe, but rather to conduct research and analyze the various possible courses of action as objectively as possible. The information was to be presented to the tribe, and all decisions were to be left to the Menominees. The committee thus shared with the BIA and the Congressional subcommittees the assumption that there was a working political democracy on the reservation and that a series of basic decisions on issues of extraordinary complexity could be left to the General Council. \* \* \* Only where the direct interests of the state were involved was the committee to take a forceful position.

\* \* \* \* \*

The study committee operated within the assumption that termination was a Federal policy and could not be changed. It conceived its function as elaborating and commenting upon the options of the tribe within the context of the legislation, while protecting the interests of the state. It was facilely assumed that the longrange [sic] interests of the state and the tribe were identical. Committee members saw the termination program as the result of an agreement between Congress and the tribe. The state committee now had to try to make the best of the arrangement for all parties.

\* \* \* \* \*

"The job of the Menominee Indian Study Committee," says one participant, "was to keep the heat on the tribe to come to their own decisions. \* \* \*"

72. The last quoted opinion was inconsistent with MISC's independent conclusion that the Menominees "do not and cannot understand the full context, intricacies and implications of the huge and complex governmental and economic plan presented to them."

[145]

THE MENOMINEES WERE IN FACT NOT PREPARED TO  
MANAGE THEIR OWN AFFAIRS AND TO CONDUCT  
THEIR OWN NEGOTIATIONS IN THE PERIOD BETWEEN  
ENACTMENT OF THE TERMINATION ACT IN 1954 AND  
ITS EFFECTIVE DATE IN 1961

73. During the period between enactment of termination and its effective date, a number of federal and Wisconsin representatives publicly expressed the opinion that the Menominees were not socially, culturally, economically and politically prepared. These included Congressmen Laird and Reuss, the latter stating during House subcommittee hearings in 1955 that:

\* \* \* Termination of the Federal Government's umbrella, which has kept the Menominee free of state taxation for the last 100 years, and has thus enabled them to make an economic go of it, that kind of termination, unless it be soundly based on the consent of the Tribe and a provision for protection of the forest, should be postponed, as far as I am concerned, forever. \* \* \*

State Senator Trinke wrote in 1959 that the Wisconsin Congressional delegation and the tribe had done everything possible to prevent approval of the termination "amendment" to the per capita payment bill, and he concluded:

It is my considered judgment that the [Menominee] Indians have not reached the status where they can control their property, and that the government should retain its responsibilities under the treaty for another twenty to twenty-five years. Five of us [of the Wisconsin Senate] \* \* \* have offered a resolution memorializing Congress to vitiate the agreement and continue the present status under which the Indians have been happy.

On July 27, 1959, State Senator LaFave, speaking to a meeting of the Menominee General Council, frankly told the Menominees that in his opinion the tribe was not ready for termination; that the Menominee leaders were not competent for self-administration; that the Menominee economy was not viable within the contemplated tax structure; and that the Menominee people were in no way ready for self-government and should be protected by a trustee.

[146] 74. County officials in adjoining Shawano County directed the following resolution to members of Congress concerned with termination:

\* \* \* WHEREAS, the State of Wisconsin, Shawano and Oconto Counties were not considered by the Congress in the passage of Public Law 399 [the termination bill] and only one hundred fifty Menominee Indians from a tribe of over three thousand attended the meeting of the tribal council which considered the acceptance of the terms of Public Law 399,

BE IT RESOLVED \* \* \* that [the senators and congressman addressed] \* \* \* be requested \* \* \*

1. To introduce immediate legislation to repeal Public Law 399 in its entirety.

75. The social scientists were similarly in agreement that the Menominees were not prepared for termination. They cite the inconsistencies in defendant's position that

the Indians were to be given the same rights as other American citizens, but thereafter to be very closely circumscribed in the management of their valuable forest as if they were wards. Dr. Orfield stated:

The Department [of Interior] thus completely reversed its policy. The most fundamental assumption underlying the termination legislation was that the Menominees were as competent as any other citizens to freely manage their own property. The Department still insisted that the tribe was competent to establish and support a local government, but that the free choice regarding the disposal of tribal property was to be qualified by restrictions which would apply to no other Wisconsin corporation. The Menominees were to lose the advantages of trusteeship without gaining the privileges of ownership.

76. As earlier found, defendant had applied a number of criteria in determining whether or not a tribe was prepared for termination. With respect to the first of these, "acculturation," Dr. Ray observed that:

[147] [I]t is a complex process comprised of a multitude of phenomena, the most significant of which do not appear on the surface \* \* \*. It may be a little closer to actuality to say that a people is to a considerable degree acculturated in the sphere of religion—as was true of the Menominees in 1954, since almost all were nominally Catholic. But it is dangerous, and usually impossible from the facts to characterize a people as being to a specified degree acculturated in the social, or the ethical sphere; or in the field of values; or work habits; and so on.

In 1954—also 1961, and today—the Menominee were far from fully acculturated in many of the spheres most critical to the successful entry on an unlimited and unrestricted basis into the world of Wisconsin whites.

Similarly Dr. Lurie testified:

It is very easy for people to see some similarities to themselves. We have made this mistake frequently in regard to Indians, and assume that in all ways and in all respects, they are going to move in the direction of, say, the European immigrants, or any other minorities.

\* \* \* \* \*

The other aspect of it was really the relative powerlessness of the Menominees by this time. Their financial situation was one in which their options had become increasingly limited. The one thing that they were all agreed on, and as far as I can tell, virtually all are still agreed on, is that they would see the solution as a reverse of Termination.

And Dr. Orfield stated, on the basis of research conducted long prior to this legislation, that:

Neither the Congress nor the BIA concerned themselves with the problem of culture, and certainly there remained relatively little of the aboriginal culture in any visible terms. \* \* \*

During a long period of dependence upon federal supervision, however, reservation life had developed a [148] system of values and expectations of its own. Tribal members were not accustomed to making their own decisions, and they had grown to expect a wide variety of services without charge. People expected to be given jobs in spite of their poor work habits. Only a small elite shared the middle class values common to a small town. Few of the Menominees had any drive to save and invest in order to improve their economic status. Most were satisfied as long as they could support themselves. There were things more important than money.

\* \* \* \* \*

The great bulk of the Menominee people show evident effects of \* \* \* [100 years of] "reservation culture." Apathetic toward tribal government, they always expected care when they were in need. Unaccustomed to planning for the future, these people could be depended upon to vote for the policy providing an immediate personal advantage, rather than that in the long-range interest of the tribe. \* \* \*

BIA figures also showed the income of the average tribal member to be comparable with that in the surrounding counties. [But] \* \* \* the size of the average Menominee family was far larger, and thus the individual standard of living was substantially lower. \* \* \* the counties upon which the comparison was based were made up of cut-over timberland which could support only marginal farming operations. \* \* \* There were no local business leaders, and all important management was in the hands of outsiders. The Menominees \* \* \* were far from possessing the skills and experience necessary to successfully run the timber operation and the local government in the manner of other Wisconsin communities.

And Dr. Ames of the University of Wisconsin concluded:

I have found no one [be he Menominee, federal official or Wisconsin citizen] who does not believe that a consistent, well thought-out program to prepare the Menominees and their neighbors for the problems of termination should have been initiated 20 years ago, if termination had to come or was desirable. Since this was not done, the Menominees, their neighbors, and Wisconsin will suffer from the lack of foresight of the federal guardian.

[149] 77. As to the Menominee's preparation for self-government, Dr. Edgerton was of the opinion that:



\* \* \* [T]here is no semblance of an informed electorate. Many Menominees are completely ignorant of the meaning of termination and most are totally innocent of modern politics. \* \* \*

Dr. Ray's report on this point observed:

Self-government in the contemporary American sense was even more foreign to the Menominee than parent-teacher groups or scout troops. In the reservation pattern, the tribal council made recommendations to the Bureau of Indian Affairs, the Bureau passed down edicts to the tribe, and litigation was handled in the federal courts. Nothing in this arrangement prepared the Menominee for dealing with the strange and complex features of Wisconsin county government, in which sphere the tribe was remarkably lacking in readiness for termination.

\* \* \* \* \*

In this same context, the history of the allotment in severalty of Indian lands should be considered. In 1887, a fundamentally new Indian policy was adopted by the United States with respect to Indian lands. The Allotment Act provided that each individual or family be given its own portion of land with the notion that the Indians would thus turn to agricultural pursuits, and tribal bonds would be weakened. The Menominees rejected the Allotment Act; they were fearful of losing their lands and they were not inclined in any way to become agriculturalists. Since the tribe continued to hold all of its lands in tribal status to the very day of termination, they had gained no experience in the handling of land as a privately held possession. As a consequence, they were much less competent to be cast on their own in the matter of land holding, as demanded by the termination legislation, than were many other tribes who had held their lands privately for many years rather than in trust status under the United States.

The government never took this fact into consideration in choosing tribes for termination. Although the tribe itself had rejected, for good reasons, the allotment principle, [150] during the ensuing years the government judged that the Menominee were not ready for allotment. Clearly, if they were not ready for allotment they were not ready for termination.

As analyzed by Dr. Orfield:

The Menominee people lacked the first requisite for self-government—a fundamental sense of community and a consensus on common ends. \* \* \*

He concluded that the Menominee Tribe was unprepared for any form of self-government, and was particularly unequipped for democratic government. He further concluded that:

[T]he Menominee people were deeply divided, and those divisions created competition, criticism, suspicion, and continual struggle against those in authority.

78. The Menominees were unprepared by education to assume the responsibilities of termination. Although Menominee children attending school at the time of termination generally reached the eighth grade before discontinuing their studies, they were not the ones involved in the problems of termination. Those decisions had to be made by older tribal leaders who had not even achieved that modest level of schooling. Furthermore, the quality of the education received could not be measured by the grades through which the children had progressed. Most of the larger students worked a half day on the farm, on the woodpile, or on the school grounds, and attended school a half day. Many completed no more than the sixth grade.

As Dr. Ray stated:

Even if the Menominee education, in the textbook sense, had been wholly equal to that of Wisconsin

generally, it would still have been no valid indication that the tribe was well enough educated to be terminated. It is an egregious error to assume that going to school on the reservation prepared a Menominee for life in the competitive world of the whites. Upon leaving school, a Menominee still knew little about typical non-reservation life in [151] Wisconsin, and had learned almost nothing about business. The only real local business was the sawmill, which was run by white employees of the Bureau of Indian Affairs—albeit they were paid by the Menominee.

On the latter point, Dr. Ames stated:

\* \* \* [I]t is not surprising that Menominee lack certain managerial and technical skills in their mill and logging operations. For many years they were excluded from the better paying managerial, supervisory and skilled positions in their own enterprise.

79. Language also presented a problem. Some Menominees in middle age spoke only their native language and termination had to be explained to them through an interpreter.

80. Relationships between the Menominees on the reservation, and the non-Indians resident in adjacent counties had never been very good. In this connection the Governor's Commission on Human Rights reported:

The Reservation system by its very nature has been a segregated system and has bred distrust and ignorance between the on-group and the neighboring off-groups by preventing normal lines of communication and contracts. Because of their special status and isolation, the Menominee have been deprived of their full American heritage in terms of the "rough-and-tumble" and "give and take" of the every-day life of average citizens.

81. In terms of general welfare termination meant the loss to the Menominees of their local doctor and hospital.

When termination was first proposed, the above-mentioned Commission on Human Rights reported that less than 5 percent of the tribal children had adequate diets, and the number of Menominee families and individuals receiving some public assistance was six times the state average.

82. Prior to termination the assets of the Menominee Tribe were held in common ownership. These assets included the reservations lands of approximately 234,000 acres, the substantial forests of hardwoods and pine, the sawmill and all other tribal equipment and buildings, and the monies in the treasury. Each tribal member of the total of 3,175 in [152] 1954, was a co-owner with a communal interest in the tribal assets. Communal ownership was an essential and traditional cultural value of the Menominees. The individual Indians had use rights recognized by the tribe and other members, but no piece of paper evidencing ownership of a particular tract of land.

As explained by a tribal officer:

Throughout the years, the individual Menominee Indian has never owned title to the land upon which his individually owned home is situated. He has owned the home privately, but not the fee title to the land under his home. \* \* \*

After termination, each individual was required to purchase the land from Menominee Enterprises, Inc. in order to have title to it and to his home. A prominent Menominee leader wrote to a United States Senator that "Rightly or wrongly \* \* \* the rank and file of Menominee people see in the termination act still another design to separate them from their homelands. \* \* \*

A woman wrote to then President John Kennedy that:

My heart is heavy with sorrow \* \* \* I am a Menominee Indian \* \* \* I can't and do not know how to express my true feelings about loosing [sic] our reservation.

### IMPACT OF TERMINATION UPON THE MENOMINEE'S BANK BALANCE, OTHER ASSETS, AND WAY OF LIFE

83. When the Termination Act was passed, the tribe had a balance in the U.S. Treasury of \$9,960,895. Shortly after enactment of the Act on June 17, 1954, \$4,905,000 of this was distributed as a \$1500 per capita to each of the 3,270 individuals on the final roll of the tribe.

84. On February 9, 1955, in response to a request from the Commissioner of Indian Affairs for advice on whether prior per capita payments made to the Menominees had been properly and legally computed, the Solicitor for the Department of the Interior concluded that per capita payments commencing [153] in 1941, based upon the fair market value of the timber cut from the reservation under the Act of June 16, 1934, had in the past been improperly computed. A recomputation of these per capita payments in accordance with the Solicitor's advice indicated that a disbursement in excess of \$2 million would have to be made unless otherwise directed by the tribe. Although advised by Bureau officials and their own leaders that full payment would endanger the economic well-being of the tribe, it voted by referendum for payment in full of the deficiency. Full payment was made in September 1955, thereby further reducing tribal funds by \$2,268,240.

85. On February 24, 1956, the Department of the Interior reported "no objection" to enactment of H.R. 6218, 84th Cong., to amend the Menominee Termination Act by providing for payment of termination planning costs out of federal rather than tribal funds. In that report the Department recited that Menominee funds had shrunk from the \$9,960,895 in the Federal Treasury as of the date of enactment of the Termination Act to \$2,150,000 in less than a year's time. The Department further reported that cash receipts for the same period had not covered tribal obligations, and that federal funds

were required for roads, schools and adult education. The report blamed the Menominees for voting themselves full per capita distributions although the Department had "urged the tribe to disburse no more than half \* \* \* in order to protect the tribe's financial position." The Department did not suggest that the tribe's quickly realized financial instability and the members' inability to perceive the dangers of disbursing so great a portion of the tribe's capital indicated a need for reconsidering the Menominee "readiness for termination." Yet the tribal bank balance in 1954 had been one of the primary factors on which Congress had relied in concluding that federal supervision of tribal affairs was no longer required.

86. As early as 1956 defendant was aware of the fact that the Menominee Tribe's bank balance had been drastically reduced by the described per capita distributions and by losses. At a hearing held before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, February 27, 1956, Mr. James Frechette, Chairman of the Menominee Tribal Council, testified:

\* \* \* Taking five of the most recent fiscal years, we show this picture:

[154] In 1951 the profits from the mill and logging were \$811,150; stumpage payments were \$306,777; the Agency budget was \$345,700; and the gain was \$178,673.

In 1952 the profits from mill and logging were \$589,550; stumpage payments were \$175,000; the Agency budget was \$496,000; and the loss was \$81,450.

In 1953, the profits from the mill and logging were \$538,900; the stumpage payments were \$85,000; the Agency budget was \$1,043,197, which includes \$550,000 for construction of new school and renovation of hospital; and the loss of \$589,297.



In 1954, the profits from the mill and logging were \$517,600; the stumpage payments were \$52,000; the Agency budget was \$488,500; and the loss was \$22,900.

In 1955, profits from the mill and logging were \$509,700; stumpage payments were \$421,000; the Agency budget was \$455,000; and the loss was \$366,500.

Our capital, which was approximately \$10 million only two years ago is now down to \$2,276.849.06.

87. At the same Congressional hearing Acting Commissioner of Indian Affairs William Zimmerman also testified. He pleaded with the committee to review the Congressional decision to terminate the Menominees. He said:

The condition, and particularly the financial condition of the Menominee Tribe, is very different from what it was when the Congress had before it the termination bill.

\* \* \* \* \*

My plea to the committee, therefore, is that this situation does require review. It has changed materially from the facts that were before you several years ago. I personally would like to see the formula adopted in Mr. Reuss's bill that any plan that should be [155] considered now would be a plan that would be approved, or drafted first, by the Tribe, and then be approved by the State and by the Department of the Interior. That seems to me a reasonable, workable formula, and it would certainly set a splendid precedent for dealing with this kind of situation in the future.

88. On July 26, 1960, 9 months prior to termination, the Menominee General Council passed a resolution, addressed to the Secretary of the Interior. It charged that

negligence had been involved in a recent remodeling of the tribal hospital, a project that had cost the tribe between \$250,000 and \$350,000. Two months later Area Director Holtz wrote to the Bureau Chief of Plant Design Construction. He stated:

Ten violations of the State building code are listed on the first two pages of the report. Other matters covered concern practices of personnel, etc., rather than the condition of the physical plant. The \$50,000 estimate of the costs of remedying the defects of the physical plant is apparently an informal estimate, which may or may not be approximately correct. An appraisal of the costs should be made by persons qualified to make an estimate, if the hospital is to continue in operation after termination.

89. However, on May 11, 1961, Acting Commissioner of Indian Affairs John O. Crow rejected the resolution of the Menominee General Council. He concluded that it had not been the intent of the Menominees in 1953 when the Menominees were still wards of the defendant that the remodeling undertaken by the Bureau comply with state requirements and that such compliance would have been too expensive to be feasible or reasonable. He rejected a tribal request that the Interior Department bring the hospital up to Wisconsin standards. The net result was that tribal funds expended for the remodeling were wasted and that the Menominees lost their hospital for failure to qualify under state standards following termination.

90. On January 20, 1965, the Menominee Tribe summarized development for MISC during the 4 years following the end of federal supervision. The report observed that serious handicaps had been an inadequate tax base (in 1965, \$16,885,000); [156] the high costs of tubercular incidence, which total \$165,578 for 1963 and 1964; and "a high ratio of welfare and correction costs

most probably due to low level income, lack of adequate job training, school dropouts and delinquency." In 1962, the first year following termination, the property tax bill for Menominee Enterprises, Inc. totaled \$480,864. In 1963, the figure dropped to \$233,000; but it rose to \$408,000 in 1965, due largely to increased school taxes. In the years 1961-1964 \$1,500,000 was spent to redevelop and modernize the industrial plant, rolling stock and equipment, and in furtherance of the forest management plan. In addition, the non-operating burden of property taxes and bond interest during this period, totaled \$2,400,000. It was further reported that the average net earnings of Menominee Enterprises, Inc. from 1962 to 1964 were \$654,000 before property taxes and bond interest. In 1964 earnings were \$692,000. Improvement was expected in 1965, but the income would have had to total \$780,000 just to cover the property tax bill of \$408,000 plus bond interest of \$372,000. This was a profit level which could not possibly be realized and a net loss was therefore reported as inevitable. Efforts to bring new industry into Menominee County had failed because property taxes, already high, were increasing; local work forces were inadequately trained; and local facilities for housing, stores, and other commercial enterprises were lacking, there being no local funds for such purposes. The report recommended that a request be made to the Congress for \$250,000 in federal aid for school purposes; \$405,500 for sewer and water development to improve sanitation and health conditions; \$100,000 per year for the fight against tuberculosis from 1966 to 1970; and for a low interest rate long-term loan to Menominee Enterprises, Inc. to finance development and to redeem Menominee stock.

91. This deterioration in the condition of the Menominees was reported to the Senate on March 25, 1965 by Senator Proxmire who stated that:

I must report, regretfully, that the consequences (of termination) for this Wisconsin tribe have been very bad, in spite of the fact that the state of Wisconsin and its university has tried to help the Menominees. The Menominees have suffered greatly. They are poor. Many are unemployed. The health of these Indians has suffered seriously.

This is the Nation which at one time controlled [157] a large portion of Wisconsin, and with which we made a treaty under which one small primeval area of Wisconsin was to remain as their territory.

Declaring that "this proud tribe is gradually and painfully disintegrating," Senator Proxmire entered into the record an article from the Milwaukee Sentinel reporting that the average Menominee family of five subsisted on an annual income of \$2,300; one out of seven was on welfare; and a third were subsisting on federal food surplus distributions. The reporter observed that:

More and more, the young Indians of Menominee County are leaving the land of their ancestors to survive.

92. The Bureau of Indian Affairs took cognizance of the deteriorating Menominee situation in June 1965. It issued a report acknowledging that the "conditions prevailing among the Menominee \* \* \* have been a cause of widespread and growing concern \* \* \*" and noted that Wisconsin Governor Reynolds had ordered a general attack on "the severe economic, educational and health problems of Menominee County." The report referred to the bills introduced in Congress by Senators Nelson and Proxmire requesting federal aid for the Menominee.

93. Also in a 1965 report to the Committee on Appropriations, House of Representatives, by the Bureau of Indian Affairs entitled, "The Status of the Termination of the Menominee Indian Tribe," the Bureau acknowl-

edged that termination of the Menominee Tribe was "ill advised." That report states that as late as 1959—

\* \* \* [T]he Wisconsin Legislature memorialized Congress to repeal or amend the law so as to continue the trust relationship indefinitely, expressing the opinion that termination was seriously premature. \* \* \*

The report further states that in an effort to avoid premature termination, two bills had been introduced in Congress in 1961. One of the bills, "\* \* \*" would have authorized postponement of termination to a date found by the Secretary of the Interior to be reasonable. The other would have postponed the termination date to 1969 at the latest. \* \* \*"

[158] Assistant Secretary of the Interior Carver had testified at the hearings for the Department of the Interior in support of the two bills. The report goes on to state:

In so doing, he [Carver] also accurately forecast the difficulties that have caused the Appropriations Committee to request the present report.

94. The BIA report described in detail the problems and difficulties facing the Menominees by reason of premature termination highlighting such facts as their low income, high unemployment, large families, substandard education, critically substandard housing, poor health, and welfare problems. Menominee County was the smallest and poorest in Wisconsin. The report concludes:

The term, "pockets of poverty," has come into general use only since 1961. It is trenchantly and accurately descriptive of a sorry phenomenon of modern American life. Menominee County is a "pocket of poverty."

\* \* \* \* \*

The foregoing review of developments in Menominee County since termination of the Federal trust in 1961 makes it clear how ill-advised were the terms on which the Menominees were deprived of Federal services and supervision. \* \* \*

These conditions and developments were predictable. They had in fact been predicted.

95. On August 4, 1961, Wisconsin Governor Gaylord A. Nelson wrote Senator Clinton Anderson as Chairman of the Subcommittee on Indian Affairs, as a followup to a discussion the two had just prior to termination, with regard to federal assistance for the Menominees. The Governor observed:

\* \* \* At that time I had hoped we might secure some positive assurance that some substantial phase-out monies would be available from the federal government to carry them through this [159] transition period and give them an opportunity to rehabilitate their mill and take over all the ordinary governmental responsibilities connected with running the county. I believe it was your feeling that you would rather await the final termination date before giving consideration to the question of phase-out monies, although it was my understanding that you felt it might very well be possible to give them some assistance.

They now, of course, have been terminated, and I have appointed all of the county officers and established their salaries and a professional mill manager has been hired. Nevertheless, the present situation is very serious, with some substantial unemployment problems; and I am genuinely concerned that this enterprise may not succeed unless we can secure help for them in the very near future. \* \* \*

There is in fact a present need for financial aid. Services in the fields of health, welfare and educa-



tion which can be provided under H.R. 4130 are absolutely essential to the Menominee community. The principal source of revenue in the community for these essential tax-supported services is Menominee Enterprise, Inc. Unfortunately, due to the present economic situation, the Menominee corporation is the key to the future success of the Menominee Indians. It is my firm belief that if the corporation fails, it will mean the financial ruin of the Menominee people and certain failure for the termination program.

It is respectfully submitted that there is a Federal self-interest and a Federal responsibility in the success of the Menominee Termination Program. Federal responsibility for the welfare of these people does not end merely by occurrence of a statutory deadline. The present economic problems on the reservation resulting from the health, education and welfare problems *are a consequence of the pre-termination situation*. Accordingly, there is a Federal responsibility to provide an economic program of orderly-phased withdrawal of Federal economic assistance. As Attorney General John W. [160] Reynolds pointed out in his testimony before the Senate Subcommittee on Indian Affairs, *one cannot take people out of an institution in which they and their forefathers have lived all of their lives and then claim that the operator of the institution has no responsibility for what happens to them thereafter*. [Emphasis supplied.]

96. Dr. Orfield's findings are also addressed to the initial 3-year period following termination. He found huge problems resulting from the fact that the new management at MEI had inherited a 50-year old plant, without needed improvements. MEI faced huge inventories and a depressed lumber market, plus the burden of supporting a new local government. Termination planning

had been based upon a dramatic increase in annual production, but the new managers found that the mill's shipping capacity was "far below that needed for a profitable operation making full use of harvestable timber."

The individual Menominee was surprised to find that he was now required to pay market value for the individual parcel of land he occupied, but was without the necessary cash to purchase it. They surrendered their MEI income bonds in lieu of cash. MEI, fighting for survival, initiated management policies which the Indians found it difficult to accept. Severe tensions developed between the tribe and its own leaders in MEI. This was confirmed by Wisconsin Assistant Attorney General Bowers' visit to the reservation on June 12, 1962. He found morale the lowest in memory, largely due to the Indians' fear of MEI and its management. MEI was, in any event, controlled by non-Indians.

97. MEI decided to dispose of the Menominee electric plant to Wisconsin Power and Light and this produced a heated dispute. Tribal members unsuccessfully sought an injunction to halt the sale.

98. The fundamental goal of termination, namely, to give the Indians control of their property, was frustrated by the acquisition of an inefficient, outmoded sawmill and the need to assume responsibility at the same time for providing governmental services in the face of exhausted capital reserves required for capital investment.

[161] 99. The individual obligation to pay taxes for the first time, and to absorb the cost of health care, utilities and other services formerly provided by the community, resulted in discontinuance of water and electrical services for a number of families. Dr. Orfield reported that more than 300 families had paid no property taxes since termination and that at least 1,000 MEI income bonds had been wholly or partially assigned for

land or welfare payments. Some Menominees were in danger of losing their homes for failure to pay for land, or for taxes levied on the land.

100. Dr. Orfield further observed that:

Over the protest of the Interior Department, Congress acted in 1956 to require permanent sustained-yield management of the tribal forest. *This action reduced the market value of the Menominee forest by more than 60 percent.* The practical effect of the amendment was to limit tribal freedom in two important respects: liquidation of the forest was made far less attractive, and the tribe was forbidden to take the option of clear-cutting the forest for a quick profit at some future date. Later, the Interior Department further limited the tribe's choices by informally notifying the tribal negotiating committee that a plan for sale of the forest would not be considered approvable. *Finally, the Wisconsin legislature refused to enact the legislation required by the tribe until delegates finally accepted a 30-year restrictive covenant, forbidding the sale or mortgage of tribal property without state consent.*

Tribal control was not only limited by law, but was also curtailed by the plan for business organization. In no sense can it be said that the tribe made a free choice in favor of this plan. \* \* \* The plan was presented to the general council shortly before the deadline, with inadequate explanation, and with no time to prepare an alternative. The tribe did not decide that this was the best plan, but only that it was better to submit a plan than to be placed under a trustee by the Secretary of the Interior. Later, this same argument was used in the election of the Voting Trustees.

The complicated document, which few began to understand, [162] provided no chance to revise the

initial decision. Control of the business was to be completely out of the hands of Menominee stockholders for at least 10 years. The First Wisconsin Trust Company was given full control of a decisively large bloc of stock. *In the end, tribal members had far less control than before termination.* Under federal trusteeship, the elected Advisory Council and the people in the general council exercised control over budgetary decisions and decisive influence over the tenure of business managers and reservation superintendents. Today, these decisions are made by a Board of Directors controlled by non-Menominees. [Emphasis supplied].

101. Many Menominees were outraged by a 1962 ruling of Attorney General Reynolds that state game laws were to be enforced in Menominee County. By treaty, tribal members had been granted the right to hunt and fish throughout the year. Litigation on this issue was eventually carried to the U.S. Supreme Court which held that Menominee hunting and fishing rights had survived the Termination Act. Later, as Governor Reynolds, he was appalled at the conditions found to exist on the Menominee Reservation. He stated:

It is incredible that as many as nine active T.B. cases are living in one house, while T.B. sanatoriums sit half empty in the State. It is incredible that the Menominees—poor as they are—are subsidizing other jurisdictions.

It is incredible that there is not a single doctor practicing medicine in Menominee County. It is incredible that practically no Menominee has been able to participate in manpower retraining programs.

102. Dr. Orfield concluded:

While accepting the power to regulate the county, the state government has shown little disposition to

assume the federal responsibility for providing assistance to the Menominees. Urgently needed stop-gap assistance has been provided, but there has been little inclination to tackle the underlying problems through a large capital development [163] program. Understandably, Wisconsin has refused to take on a major state responsibility shared by no other state in the nation. Substantial help is needed now, but no one accepts full responsibility for the Menominee community.

\* \* \* \* \*

Many Menominees still hope that something will happen to change the situation, and most favor repeal of the termination law. More than 800 members, a majority of the adults, signed the following petition:

"We the undersigned, members of the MENOMINEE INDIAN TRIBE, do respectfully petition the Congress of the United States to immediately enact legislation which will repeal Public Law 399 of the United States Congress."

The economic position of the tribe was clear long before termination. Through per capita distributions of tribal funds, reserves had declined dangerously by 1956. As the lumber market entered a long decline in 1958, the tribe's position became increasingly precarious. Well before the termination date, it was obvious that only the most optimistic projection of corporate income could show economic viability for the new county. Menominee Enterprises fell far short of this goal, and the tribe now faces economic disaster.

\* \* \* \* \*

In the ten years since passage of the termination act, none of the major goals has been realized. Even if the objectives of assimilation and tax responsi-

bility are eventually realized, the cost will be exorbitant. Taxes will be taken from people unable to pay, and the process of intergation will be begun by people with neither confidence nor skills, at the bottom of the urban slums. Termination was based on a series of false assumptions, and the policy cannot achieve the goals so convincingly set forth in the committee hearing room. The Menominee Tribe is dead, but for no good reason.

[164] 103. Many of these conclusions were echoed by Congressman Melvin Laird in his testimony before a House Subcommittee on March 15, 1966, during its consideration of a bill to provide financial assistance to the Menominees. He testified that the Menominee Indians had deteriorated from "one of the wealthiest tribes in America" to "one of the worst pockets of poverty in the country. During this period the tribe has been forced to deplete its treasury of \$10 million and some believe it is on the verge of losing its timber land valued at \$35 million."

It was his opinion that:

\* \* \* [A]fter the tribe voted for the "principle" of termination in 1953 against my recommendations (in order to receive their per capita payment), hearings were held and legislation passed in 1954 terminating the Menominee Indians (PL 83-399). It was from this point to the present day that lack of responsibility by the federal government has been a burden and a detriment to the Menominees and those working with them.

104. Congressman Laird pointed out that vital statistics for the tribe had worsened between 1954 and 1964. The birthrate had increased and so had the infant mortality rate. There were fewer full-time jobs in the county. The incidence of tuberculosis had produced a cost 15 times that expected at the time of termination.



Median income had risen from \$2,300 to only \$2,677 in 10 years, and those on welfare programs had increased. His testimony continued as follows:

\* \* \* The federal government did little to help prepare the Menominees for their new responsibilities as a county, the type of post-termination status the tribe chose rather than splitting the reservation among several counties.

As a reservation, the Menominees received little from the federal government. A sanitation aide was provided through the Public Health Service and money was allocated for road work. The tribe supported its own welfare program, hospital and medical facilities, operated its lumber mill, and paid for the education (as well as scholarships) of its youth. With termination the hospital had [165] to close because it was run by the Catholic church and could not be operated with public money from the county. The welfare program had to come completely under state jurisdiction. The lumber mill was found to have 132 faults which required repairs before the mill could pass state standards. It was expected that there would be a gradual shift of students from the tribally supported parochial schools into joint school district # 8 of Shawano, of which the county was to become a part. In almost every phase of tribal operations, it was found the reservation was below state standards and regulations.

It would seem that it was then the duty of the federal government to raise the tribal reservation to state standards before turning the area over to Wisconsin. However, efforts were not made (except in road work) and the attitude prevailed that raising the reservation's standards was the problem of the Menominees and the state of Wisconsin.

\* \* \* \* \*

\* \* \* By any standard, Menominee county residents show the greatest need for increased and better governmental services but simply are not able to capitalize on these programs because of the precarious tax revenue situation which now exists. They can't keep paying \$1½ million in taxes, with the lumber mill paying 92% of those taxes, and expect the mill to expand its operations and to meet the growing expenses of required government services as well.

\* \* \* \* \*

A total estimated cost of \$500,000 is needed to complete sanitation projects.

\* \* \* \* \*

It should be noted that the mounting of an effective local health program for the residents of the county is seriously impeded by the absence within the boundaries of Menominee county of a hospital, health department, or even a practicing physician or dentist.

\* \* \* \* \*

[166] In answer to an argument that there are unique problems with every poverty situation, and Menominee county should not receive special attention, it should be remembered that the historical relationship of the Menominees with the federal government does make it a much more special case. Not only as a reservation, but as the first major tribe to be terminated and turned into a county, the Menominees have had a "special" relationship with the federal government. As such, the Indians need "special" consideration because of the unusual problems resulting from that federal termination.

\* \* \* \* \*

As it stands now, the Menominee termination has served as an example of federal mismanagement and causes apprehension among many tribes when plans of progress are suggested to them.

105. Congressman Laird did not believe that "the Federal Government once it legally terminates its responsibility for the welfare for an Indian tribe, can then abruptly wash its hands of the whole affair. \* \* \*

\* \* \* \* \*

A sizeable number of Menominees persist in the view not only that termination was unwise, but that it was forced upon the tribe without full discussion or understanding, and that it constitutes a gross violation of treaty rights. The highly vocal exponents of these views are few in number but such opinions may be shared by a substantial number who do not attend public discussions or who remain silent. A related viewpoint is that termination may have been technically legal, but that the Federal Government cut off its services too abruptly and before all appropriate Federal investment in community facilities had been completed.

In April 1964 a petition for repeal of the Menominee Termination Act was addressed to the Congress carrying signatures of 788 persons identifying themselves [167] as Menominee Indians. A duplicate set was sent to the President and receipt was acknowledged by the Bureau of Indian Affairs. \* \* \*

He concluded by stating that:

The foregoing review of development in Menominee County since termination of the Federal trust in 1961 makes clear how ill-advised were the terms on which the Menominees were deprived of Federal services and supervision. \* \* \*

106. Similar conclusions have been voiced and published by others. On June 15, 1971, Senator George McGovern, commenting on "the folly of the now rejected policy of termination of our Indian citizens," expressed the opinion that:

\* \* \* Had we given the Menominees of Wisconsin a voice in their fate, for example, they would not have been terminated but instead would be flourishing.

Newspaper accounts of the failure of the termination policy applied to the Menominees, referred to them as "guinea pigs" in a social experiment loaded with good intentions. Articles are, for example, headlined "Last Rites For an Indian Nation," and "The Menominee: Victims of Experiment," and "Pocket of Poverty."

107. On July 8, 1970, the President of the United States formally urged repudiation of the House Concurrent Resolution 108 of August 1953 to the effect that termination of Indian tribes was the long range goal of the Congress. He stated:

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. [168] Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and

public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups. I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. \* \* \*

108. In 1973, Congress restored federal supervision over the Menominees, in an act entitled "Menominee Tribe of Wisconsin: Restoration of Federal Supervision" (Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. §§ 903-903f (1976)) which repealed [169] the Termination Act and restored the Menominee Tribe and reservation to trust status.

ULTIMATE CONCLUSIONS REGARDING THE GENERAL  
HISTORICAL BACKGROUND OF THIS DEED  
RESTRICTIONS CLAIM

109. Following enactment of the Termination Act in 1954, defendant failed to adequately assist plaintiffs in preparing for final termination which became effective 7 years later in 1961.

110. During that 7-year period, plaintiffs were still in a fiduciary relationship to defendant and were therefore entitled to continuous federal supervision and protection in their extensive negotiations with federal officials and the State of Wisconsin leading to the reconveyance to them of their land.

111. The interests of defendant, as trustee, together with those of the State of Wisconsin, on the one hand, were in conflict with the economic interests of plaintiffs, as wards of defendant. Plaintiffs, as wards of defendant, could not effectively consent to the return of their land to them at substantially reduced value, nor could the subjects of a trust relationship effectively consent to a breach of the trust.

BACKGROUND OF DEED RESTRICTIONS CLAIM AND  
VALUATION OF THE MENOMINEE FOREST

112. The deed restrictions are set forth in finding 34, *supra*. Plaintiffs' claim proceeds from the provision of the Termination Act that required the tribe to formulate and submit to the Secretary of the Interior "a plan for the future control of the tribal property;" from the 1956 (Reuss) amendment to that Act requiring that the plan contain a "provision for protection of the forest on a sustained yield basis," [170] from imposition of post-termination restrictions and the inflexible nature of those restrictions in the deed of the Menominee Forest from defendant, as trustee, to plaintiffs with a consequent reduction in market value of the deeded property.



113. The reduction in value was the subject of expert testimony presented by plaintiffs, addressed to market value of the forest on the date of termination (April 30, 1961) without restrictions; with the restrictions above-described; and without restrictions, and exempt from property taxes.

114. Experts offered by plaintiffs were the following: *George Banzhaf*, a forest resource consultant and President of George Banzhaf & Company. He obtained his Bachelor of Science degree in forestry from the University of Michigan in 1922 and has been engaged in forest management since 1924. He has had impressive experience in the management of large forests throughout the United States and Canada, and an intimate working knowledge of the practice of selective logging since the inception of that practice in the Great Lakes area during the 1920's. He is a member of the Society of American Foresters and a registered forester of the State of Michigan. He has published numerous articles on selected forestry topics and has for a number of years conducted undergraduate and graduate seminars at the University of Michigan's School of Natural Resources. He is highly respected in his field.

*William H. Banzhaf*, Vice-President of George Banzhaf & Company, and George Banzhaf's son. He received his Bachelor of Science degree in forestry from the University of Michigan in 1967 and has been engaged continuously since that date in forest management activities. He has been involved in the direction and planning of most of the services performed by George Banzhaf & Company, both in the United States and Canada. William Banzhaf is also a member of the Society of American Foresters and is also a registered forester of the State of Michigan. Services performed by the Banzhafs have included forest inventories; valuations and appraisals; forest resource studies and field audits; analyses of forest management and forest products; cost and marketing studies, policies, and procedures; installation of con-

tinuous forestry inventory systems; growth studies; public land timber policy for the Government; studies involving feasibility and location of forest resource converting facilities; interpretation of aerial photographs; and inventory and appraisal of forest land recreational opportunities.

[171] *Richard C. Winslow*, has been continuously employed as a forestry consultant for George Banzhaf & Company, full-time, since 1969, and part-time from 1967 to 1969. He received a Bachelor of Arts degree in forestry in 1966 from the University of the South, and a Master of Science degree in forestry in 1969 from the University of Florida. He has had extensive experience with the installation of continuous forest inventories and with audits and other forestry inventory methods. He has had extensive experience analyzing forest inventory and growth data as related to forest management problems. Mr. Winslow has also worked for the Union Camp Corporation of Savannah, Georgia, as a "working circle forester," carrying out management policies on a block of that corporation's forest land. He is a member of the Society of American Foresters and Xi Sigma Pi, an honorary forestry scholastic fraternity.

*Wesley Rickard* has been a consulting forest economist since 1968, operating out of Tacoma, Washington. In that capacity, he is deeply involved in "the science and practice of the efficiencies of forest management, forest production, [and] the influence of forest management and production on \* \* \* large and small communities." Mr. Rickard received his Bachelor of Science degree in forestry from New York State University in 1957, and his Master of Science degree in forestry economics from Michigan State University in 1959, and during his attendance acquired considerable experience in forestry management and economics by engaging in part-time and summer work with the United States Forest Service and the New York state forest system. From 1959 to 1960,

he was employed as a technical forester for Weyerhaeuser Company. From 1960 to 1962, he worked as a forest economics researcher for the United States Forest Service. From 1962 to 1968, he managed the Weyerhaeuser Company forest economics department. He has since 1968 developed forest management strategies, and engaged in operational planning for various of the major timber companies, including Pope & Talbot, Weyerhaeuser Company and Georgia-Pacific Corporation. He has also performed an analysis of public lands, state and federal, for the State of Oregon and has performed services for the Washington State Legislature Tax Committee relating to an excise tax rate on forest lands and forest production. In the course of his career, Mr. Rickard has worked throughout the United States, and possesses high [172] academic and practical qualifications. He has authored a United States Forest Service publication dealing with old growth Douglas fir, and more recently has written *The Action Forest*, "an expository report showing how public forest productivity can be increased by more than 100 percent." Mr. Rickard actively participates in relevant professional groups, including the National Association of Business Economists, the Society of American Foresters, the Western Forest Economists and the Operations Research Society of America. In addition, he is a member of the honorary forestry fraternity Alpha Xi Sigma, and of the Phi Kappa Phi Fraternity.

115. Plaintiffs also presented two expert witnesses in rebuttal, Dr. Duncan A. Harkin, a forest economist and Associate Professor of Agricultural Economics and Forestry at the University of Wisconsin; and Robert E. Kleiner, a forestry consultant, real estate appraiser, logging engineer and land surveyor.

APPRAISAL OF FAIR MARKET VALUE OF THE  
MENOMINEE FOREST, WITHOUT RESTRICTIONS,  
BY GEORGE BANZHAF & COMPANY

116. George Banzhaf & Company prepared a report entitled "An Appraisal of the Menominee Forest as of April 29, 1961." The firm and its officers have appraised a number of large forest properties throughout the United States, and specifically in the Great Lakes area, including 300,000 acres for Cleveland Cliffs Iron Company; 350,000 acres for Ford Motor Company; 500,000 acres (in the southeast) for Ramer Corporation; 300,000 acres in the Pacific northwest; 1 million acres in British Columbia; and 20,000 acres in Alabama. In the case of the Ford Motor Company land and the acreage in Alabama, George Banzhaf was later informed that the actual sale prices closely approximated his appraisals.

117. The Banzhaf appraisals were independently tested and reviewed by the aforementioned forest economist, Wesley Rickard, based on his experience in analyzing forests in terms of their community economic impact, resource supply, investment and production opportunity, forest management strategy and operational plans and cash flow projections, including impact of land and timber taxes.

[173] 118. The Banzhaf report concluded that the total value of the Menominee Forest, without restrictions, as of April 29, 1961, was \$39,893,680. The basis for that appraisal is hereinafter set forth.

119. The appraisal method employed was to determine the worth of the standing timber (stumpage), and the value of the underlying land, based upon transactional evidence, *i.e.*, the composite judgment of willing buyers and willing sellers as reflected by actual sales of comparable stands of timber during the relevant time period.

120. The transactional evidence employed did not include general averages of stumpage unit values based

upon statewide ranges in price, but relied instead upon stumpage unit values established by timber sales in the vicinity of the Menominee Forest, even though they involved timber of inferior quality and value.

121. Stumpage volume was determined by reliance upon a 1963 Continuous Forest Inventory (CFI), a light statistical sampling based on permanent sample plots arbitrarily located on a grid pattern, and designed to furnish a reliable total inventory. The 1963 CFI was the only available volume figure close in time to the date of termination, and susceptible to audit.

The Banzhafs also took note of and considered the 1957 so-called Hartman cruise and CFI inventories made in 1960, 1963 and 1970. There was no available evidence, based on an interview with Mr. Hartman, of how that cruise had been performed. Moreover, the Hartman cruise was so out of line with the 1960, 1963 and 1970 CFI's, that it was rejected as a reliable measure of stumpage. Data underlying the 1960 CFI was not available to the Banzhafs but they were given access to the field data cards employed in preparing the 1963 and 1970 CFI's. They checked those notes by personally measuring a group of randomly selected plots, utilizing the same tools and techniques employed by those conducting the CFI's, and concluded (based on a 1971 audit) that the 1970 CFI had been conscientiously and competently performed. Based on approximate diameter and height rates of growth, they were thus able [174] to check and confirm the accuracy of the 1963 CFI. Because the forest was being operated on a sustained yield basis, where growth and cut were theoretically in balance, the 1963 CFI was determined to be reliable for ascertaining 1961 stumpage. The 1963 CFI was, nevertheless, adjusted downward to reflect certain height measurements which the Banzhafs concluded did not represent average utilization standards. Further reductions in volume of 15 percent for the hemlock sawtimber,



and of 5 percent for all other species, were made to "better reflect merchantable volume." The Banzhaf report lists the adjusted 1963 inventory figures for each species within the Menominee Forest, together with sawtimber and cord values for each species, as established by sales from the Nicolet National Forest which is just north and slightly west of the Menominee Forest. The Nicolet timber is inferior in quality and value to that of the Menominee's. At trial, timber sales from the Cleveland-Cliffs Iron Company Forest were also cited. The latter are more comparable to the Menominee Forest values but are not directly reflected in the Banzhaf report. In this way the report computes the value of the Menominee Forest stumpage.

122. The bare land value is added to stumpage value to achieve the total value of the Menominee Forest. Bare land value is based on the product only if the soil, and the intrinsic value of land ownership. At \$12 per acre, the appraisal computes to \$2,688,708 as the bare land value of the 224,059 acres.

123. Size of a forest is itself an appraisal factor because a forest industry is necessarily concerned with inventory and the assurance of a continuous raw material supply. The Banzhaf report reflects this factor.

124. The report also reflects certain so-called safety factors, that is, reductions for size and risk in lieu of discounts to present value. Saplings below pulpwood size (less than 4 inches breast-high diameter) are assigned no value at all in the Banzhaf appraisal. This is in effect a discount of value, because a prospective purchaser would know that:

\* \* \* young stands had been established and, that at some date in the future, assuming no [175] fires or other catastrophes, they will be harvested. Hence, they do have a value reflecting their potential.

Timber of pulpwood size is assigned pulpwood value, although its ultimate use at maturity would be as saw-



timber. The potential for a considerable volume of healthy pole timber to mature into sawtimber, was also assigned no value in the appraisal report.

125. The sawtimber values assigned to each species is based on weighted average prices by species of sales by the U.S. Forest Service from the Nicolet National Forest for the period July 1960 to July 1961. Use of Nicolet prices constitutes another safety factor since it is timber of inferior quality. For example, the percentage of Grade #1 trees in the Northern Hardwood group (maple, yellow birch, basswood, beech) was 22 percent for Nicolet as against 45 percent of the Menominee Forest. Grade #1 hard maple delivered at the mill brought \$70-\$115 per thousand board feet in 1961, whereas Grade #2 hard maple brought only \$40-\$70. The difference in the value of grades of other species was in accord. The overall percentages for Nicolet were Grade #1, only 15 percent; Grade #2, 28 percent, Grade #3, 46 percent; Grade #4, 11 percent. Retail values of the Menominee Forest were more accurately reflected by sales from the Cleveland-Cliffs Iron Company Forest, but those figures were not available until trial. Although somewhat influenced by the Cleveland-Cliffs values, the Banzhaf report was prepared long before trial and is based on Nicolet values.

126. In addition to adjusting the 1963 inventory downward to account for height measurements which did not represent average utilization standards, the Banzhaf report further modified them downward to better reflect merchantable quantities, by reducing hemlock sawtimber volume by 15 percent and all other species by 5 percent.

127. No value was assigned to the Menominee Forest in the Banzhaf appraisal for the forest's extensive lakes and rivers, although the record reflects that recreational potential is a valuable attribute of any forest.

128. The Banzhaf appraisal of \$39,893,680 is a valid and reasonably constructed determination of the fair market [176] value of the Menominee Forest as of April 29, 1961, without restrictions.

#### STATE OF WISCONSIN APPRAISAL

129. An appraisal of the tangible property of the Menominee Tribe by tax appraisers of the State of Wisconsin concluded that the Menominee Forest was worth about \$30 million based upon stumpage prices. This appraisal was based upon a forest inventory by conventional ground cruise, the 1957 Hartman cruise above-mentioned. Because the forest was being operated on a sustained yield basis, with growth and cut theoretically in balance, this appraisal concluded that the 1957 volume could be used as a basis for value in 1961. Sawtimber volume was listed as 869,547 thousand board feet, and pulpwood as 160,841 cords.

130. The Wisconsin Supervisor of Assessments assigned a value per thousand board feet of saw logs to each species. In valuing birch, basswood, oak and maple, he distributed between common timber and timber suitable for flooring or veneer. To this he added value for pulpwood, other wood products, and reproduction value, to reach a total value for wood products, as follows:

Total saw logs	\$28,610,185
Pulpwood (cords)	413,504
Other wood products	480,717
Reproduction value	956,880
<b>TOTAL</b>	<b>\$30,461,286</b>

The record does not indicate how the values for the various constituents of the forest were determined, but it may be assumed that the values reflected were assigned by the assessor for tax purposes.

These determinations by the assessor have been questioned by both parties. Plaintiffs, for example, note that

the Supervisor of Assessments found an average value for the Menominee sawtimber of approximately \$32.90 per thousand board feet. If this average value were applied to the 1963 inventory as adjusted by Banzhaf and Rickard, the value of the sawtimber alone would equal \$46,533,760, a figure considerably higher than that found by the Banzhafs.

[177]

## THE RICKARD APPRAISAL

131. The forest economist, Mr. Rickard, found on the basis of data collected by the Banzhafs, adjusted in accordance with his own expertise as a forest economist, and using a discount to present value approach in lieu of employing safety factors, that the market value of the forest as of the date of termination was \$38,500,000. This tends to confirm the validity of the Banzhaf appraisal, independently arrived at by the methods above-described. Mr. Rickard calculated value, as did the Banzhafs, upon a stumpage basis using the 1961 inventory figure of 1,414,400 MBF reached by the Banzhafs as a result of their audit of the 1963 CFI. He had independently reached a figure of 1,440,000 MBF by interpolating between the 1958 and 1963 CFI's, which he then adjusted to the Banzhaf figure because it was so close. Defendant's expert witnesses actually reached a higher figure of 1,495,000 MBF for the 1961 inventory by adjusting the period 1961-63, and subtracting growth during the same period.

132. In calculating the value of each species of timber in the Menominee Forest, Mr. Rickard rejected sale prices for timber in the Nicolet National Forest because both the Banzhaf report and a real estate research report described the Menominee Forest as far above average in value, and because the quality of timber in the Nicolet Forest is known to be inferior to that of the Menominee Forest.

He also rejected the use of stumpage values developed by the Bureau of Indian Affairs because BIA values were not based upon actual sales of stumpage on the open market. They resulted rather from the application of the so-called "Delaney formula," a mathematical formula converting rough timber prices and veneer log prices back to stumpage value. The formula had been used by the BIA for bookkeeping purposes to allocate part of the income of Menominee Mills to the mill itself, and part to the forest. Its accuracy is questionable, particularly since the formula value of Menominee stumpage developed by this method comes close to open market sale values of Nicolet Forest stumpage, which is known to be less valuable.

133. Mr. Rickard calculated lumber and veneer log values for each species of timber in the forest by reversing the Delaney formula to convert the stumpage value as determined by Delaney, back to veneer and rough lumber prices. He subtracted milling and logging costs from the latter, to determine true stumpage value. The values thus determined were checked against the range of stumpage values documented in the Wisconsin Forest Products Price Review for 1961, and [178] found to fall within the upper limits of that range. Mr. Rickard considered this to be a confirmation check because of the acknowledged high quality of Menominee timber.

134. Using these stumpage values, he determined the average value per MBF for all Menominee stumpage as of 1961, from which he subtracted \$3.75 per MBF to cover costs of administration and management, achieving at net weighted average value of \$43.70 per MBF for all species. Multiplying this by the inventory, he calculated a retail stumpage value figure of \$61,809,000 which an investor would recover over a period of years. He therefore discounted retail value over a 10-year period, and computed 1961 "present value" by deducting for capital gain tax, plus 10 percent annually for tied-up

investment. With these discounts he concluded the present value in 1961 of the Menominee stumpage to be \$32,601,900. He computed the weighted average value for cord wood at \$2.09 per cord from Nicolet Forest sales, because there is no quality differential for cord wood. Using volume figures developed by the Banzhafs, he found a retail stumpage value of \$1,175,200, and a present value of \$618,500 after discounting at 10 percent after taxes over a 10-year period.

135. On information provided by the supervisor of the Nicolet National Forest that bare land in that area was worth \$40 to \$60 per acre, Mr. Rickard valued the 233,902 acres of Menominee land at \$50 per acre, for a total of \$11,695,100.

From this figure, he deducted income (capital gain) taxes that would have to be paid on sales of land (*i.e.*, on the difference between appraised land value or cost basis and market or sales value), and reached a present value as of 1961 of \$6,168,000. Mr. Rickard further calculated the present value of property taxes to be deducted in the amount of \$931,500 over the 10-year period of potential land sales.

136. The bare land value of \$40-\$60 per acre assigned by the Nicolet National Forest supervisor was based on his definition of bare land as land with brush on it and young trees below merchantable size. Mr. Rickard's \$50 per acre figure, when fully discounted, comes to \$22.39, compared with the Banzhaf appraisal of \$12 per acre. The Banzhaf figure totally disregarded the market value of sapling stands, this being one of its safety factors as above described. Mr. [179] Rickard, as had the Banzhafs, assigned no recreational value to the forest by reason of its lakes and rivers.

137. Mr. Rickard concluded that the fair market value of the Menominee Forest without restrictions, as of April 1961, was \$38,456,900. This figure bears a reasonably

close relationship to the Banzhaf appraisal of \$39,893,680, although the two appraisals were reached by substantially different routes. It also is a valid and reasonably constructed determination of the fair value of the Menominee Forest, without restrictions, as of April 29, 1961.

138. Another forest economist, Dr. Duncan Harkin, reviewed the Banzhaf and Rickard appraisals, and those offered by defendant's experts. He concluded that the Rickard appraisal was the most valid because it developed true stumpage value based on lumber sales, less milling and logging costs. He did not favor the use of average open market stumpage values, because of the higher than average quality of the Menominee timber. He also, incidentally, rejected the statement in defendant's appraisal (hereinafter reviewed) that the capitalization rate for agriculture was only 2½ percent, observing that it averaged 7 percent for the period 1949-1968.

#### APPRAISAL OFFERED BY DEFENDANT

139. Defendant's appraisal is in the form of a joint report prepared by Stanley F. Miller, Jr., Vice-President of Real Estate Research Corporation, assisted by Norman E. Briesemeister, Edward F. Steigerwaldt and Professor John Carow. Messrs Miller and Briesemeister do not normally appraise forest land, but Messrs Steigerwaldt and Carow are qualified in forestry. At the time of the submittal of defendant's appraisal report, Mr. Briesemeister's experience as a real estate appraiser consisted of approximately 1 year after his graduation from college, spent in the mortgage department of an insurance agency.

140. The appraisal report submitted by defendant's experts valued the Menominee Forest as of April 30, 1961, at \$31 million. The figure is reached by the market data (comparable sales) approach which in the Miller report produced a value of \$32 million, which is then reduced, without explanation, to \$31 million. However,



at another point, a value of \$32 million is also proposed. The latter figure is deemed to have been checked and confirmed by an income capitalization approach, which produced a value of \$27,100,000 [180] when computed by Mr. Miller, and a value of \$32,400,000 as computed by Professor Carow.

141. In developing the market data figure of \$31 million, Mr. Steigerwaldt, a forestry consultant to Mr. Miller, analyzed nine sales of forest land consisting of two in Wisconsin, five in Michigan, and two in Maine, for their possible use as comparable sales. The Maine sales (designated H and I) are ultimately dismissed as being useless as comparable sales. Mr. Miller prepared the appraisal itself, based upon figures supplied by Mr. Steigerwaldt, but not based on Mr. Steigerwaldt's expert opinions as to the comparability or non-comparability of the tracts he had analyzed under a market data approach.

142. The sales analyzed by Mr. Miller span the period 1964-68 and he adjusts 1966 data downward about 15 percent (3 percent a year to the 1961 base) "to correspond to the deviation in the cost of living index, and a 1.6 percent average increase in stumpage. \* \* \*" The sales are not, however, adjusted to achieve comparability in other respects observed by Mr. Steigerwaldt. Mr. Miller rejected the use of percentages of species of timber in the various parcels, as compared to the Menominee Forest. He found this method "not possible" because "the variables are not consistent and vary too widely."

143. An incomplete adjustment to reflect the acknowledged greater quantities of timber in the Menominee Forest is made by computing the average board feet per acre of sawtimber, and increasing the per forested acre formula-computed value of the "comparable" in the proportion which Menominee board feet per acre bore to board feet per acre of the "comparable." For example, Sale "A" (purchased by American Can in 1964) consisted of 9,574 acres in Lincoln and Marathon Counties,

Wisconsin. It averaged 4,000 BF per acre and sold at \$93 an acre. Mr. Miller calculated a proportionate value for the Menominee Forest as follows:

$$\frac{10,568}{4,000} \times \$93 = \$245.71 \text{ per forested acre}$$

He multiplied that figure by 144,495 forested acres, arriving at an appraisal of \$35,503,866 which he found subject to "further adjustment." But in arriving at that appraisal he [181] counted only the number of acres currently in sawtimber, and excluded acreage in pulp and pole timber as well as sapling acreage.

144. The Miller appraisal makes no adjustment for differences in the types of timber available nor for differences in the quality of the timber. The Menominee Forest has a high incidence of veneer quality timber, whereas some of the "comparables" had a high incidence of cull and poor quality virgin timber. The price of saw logs delivered at a mill varies greatly according to grade and according to type and species. For example, the species ash sold at the mill in 1961 for a low of \$15 MBF for Grade 3 logs and a high of \$100 MBF for veneer logs. Even within grades, the price varied greatly, Grade 1 ash saw logs brought \$50-\$75 MBF, depending upon quality. Beech Grade 1 saw logs on the other hand, brought only \$30-\$50 MBF.

145. In more general respects also, the "comparables" used in the Miller appraisal were not truly comparable. Sale "A", for example, consisted of less than 10,000 acres within a heavily dairy farm-oriented community. As Mr. Steigerwaldt noted for Mr. Miller, since the sawtimber had never been cut for forest products, it contained "a high percentage of cull and poor quality hardwood and hemlock. \* \* \* Further, comparison with the Menominee sawtimber would indicate a considerable variation with stand size and quality, with Menominee forest types definitely better." Other factors were found to be comparable. It is noted that pole stands of mixed hardwood

and apsen apparently were an important appraisal factor in Sale "A", but have been excluded in the appraisal of the Menominee Forest.

146. The important factor of the acknowledged superior overall *quality* of the Menominee timber is not weighed in the Miller appraisal. A discount of 6 percent, presumably for "location," is taken in the Menominee appraisal, although Mr. Steigerwaldt had found that its location compared favorably with that of Sale "A". The location of the Menominee Forest in relation to a road system, a railroad, and a cluster of veneer mills in the heart of a paper-producing state, make it at least the equal of Sale "A" in that respect. Aside from a general 5 percent allowance for areas other than those forested with sawtimber, there is no indication that the Miller appraisal gives any consideration to the sizeable recreational value of the Menominee Forest, a factor lacking in Sale "A".

[182] 147. Sale "B" (to Mead Corporation in December 1966) is described by defendant as:

239,559 acres in noncontiguous and scattered tracts spread over seven counties in Michigan's Upper Peninsula. \* \* \* The purchase by Mead Corporation was made to increase its holdings in pole stands and is poor compared to the sawtimber types found in the Menominee Forest. The solid ownership of the Menominee tract, with its superior road and river system, indicate advantages on the side of the Menominee Forest.

Defendants' expert, Mr. Steigerwaldt, states with respect to Sale "B":

Although close to the same acreage of the Menominee forest, it is a poor comparable for sawtimber types. This purchase by Mead was made to increase their holdings in pole stands and cannot compare to the size classes on the Menominee. The solid ownership of the Menominee and excellent road system is su-

perior to the Mead tracts \* \* \* [t]he Mead tracts do have better and more water resources in their lakes, but no rivers of the quality to compare to the Wolf River flowing through the Menominee.

No adjustment is made in Mr. Miller's appraisal for the superior location of the Menominee Forest as a single, solid tract. The adjustment for the greater *quantity* of sawtimber in the Menominee Forest would alone raise its value to \$35,652,000 if Sale "B" is used as a comparable. This does not take into consideration its superior location and *quality*.

148. Sale "C", 52,000 acres in the Upper Michigan Peninsula, was rejected by Mr. Steigerwaldt as a comparable because it was in small scattered parcels, presented difficulties in access, was not comparable in water or road networks and because of unreliable information on sale price. Mr. Miller, however, used it in his "Market Data Comparison Approach to Value of the Menominee Industrial Forest Under Wisconsin Statute 70.335."

[183] 149. Sale "D" consisted of 18,417 acres, including 4,000 acres of water, purchased by the U.S. Forest Service in Michigan for its recreational value. Mr. Steigerwaldt found this sale to be the most comparable to the Menominee Forest, stating:

With its extensive acreage of one solid ownership, plus the solid forest cover, it is comparable to the Menominee. However, the composition of the forest differs in that Sylvania is virtually all virgin timber with only a minor history of logging. The large size of the timber may be esthetically appealing, but for market value as sawlog material it is not as valuable as the stem selection cut stands of the Menominee Forest. The Sylvania tract has virtually no road system and none of the lakes were accessible unless approached by walking and portaging with canoes. These lakes are far superior to the lakes

on the Menominee. On the other hand, all the water resources of the Menominee are easily accessible and the well built road system is a major plus factor for the Menominee forest. It is also comparable to the Menominee for the closeness to sawmill and veneer markets.

The Menominee Forest features about 35,000 more feet of water frontage than the acreage involved in Sale "D". Under the income capitalization approach to appraising the Menominee Forest, defendant's experts found that the recreation potential of the forest had a net income value of \$2,100,000. Mr. Steigerwaldt valued the lake frontage in Sale "D" at \$7.20 per front foot. In his appraisal, however, Mr. Miller compared the Menominee Forest and Sale "D" only with respect to their value as forest lands, excluding their recreational value, although both forests include both timber and recreational values. He makes no adjustment in favor of the Menominee Forest by reason of its location and road system. The Sale "D" parcel is virtually without a road system.

150. Sale "E", to the U.S. Forest Service in July 1968, consists of three tracts totalling about 2900 acres in two Wisconsin counties. It has 28,910 feet of frontage on two lakes and 2 miles of river frontage. Mr. Steigerwaldt stated [184] with respect thereto:

Consisting of 2,946 acres in northern Wisconsin it is almost all in northern hardwood type. Portions are virgin hardwood and hemlock timber showing high incidence of cull and defect. Some areas had minor amounts of stem selection cutting and small areas had been clear cut. Pole stands of northern hardwoods were well stocked.

A comparison with the Menominee would, in our opinion, indicate timber size classes and quality would be poorer than the Menominee as the selec-

tively cut Menominee Forest has a greater diameter and volume range at different ages, plus better quality sawlog material. The road net is comparable and the water resources are fairly comparable for the lakes, but the Wolf River on the Menominee is a superior stream to the branch of the Flambau flowing through the Doering tract.

Mr. Miller, however, rejected it in developing his market data appraisal "due to lack of definitive data." Plaintiffs do not urge it as a comparable, but observe that the recreational potential of Sale "E", deemed by Mr. Steigerwaldt to be inferior to that of the Menominee Forest, was used to enhance his stumpage valuation of the Sale "E" tract by 263 percent. The Banzhaf appraisal (*see* finding 127 *supra*) did not, in contrast, include any enhancement of the forest value or land value for the recreational potential of Menominee Forest, a further indication of a conservative appraisal approach.

151. Sale "F" is described by Mr. Steigerwaldt as follows:

This acreage of close to 24,240 acres is scattered in parcels less than a section in size over many townships. It is not blocked as the Menominee. The forest composition is similar with over half the acreage in sawtimber types, and also consists of northern hardwood-hemlock. Fair access for road requirements on the All-Wood, but practically no water resources are present. It is very advantageously located to the buyers own sawmill at Baraga, and is thus comparable to the Menominee for this [185] factor. We would feel the timber types and specie composition would be comparable to the Menominee for about one-half their timber acreage. This tract was part of the original Ford Fund lands in Baraga County in which selection logging, clear cutting and uncut tracts are all in the sale area.



On the selection cut areas we would state that the two forests are comparable, but the residual volume per acre is greater on the Menominee Forest than the All-Wood tract, and hence the stumpage conversion value would be about half of the Menominee Forest.

It is clear that defendant's forestry expert considered only about one-half of the timber acreage comparable to the Menominee Forest, for the reasons stated, if adjusted for Menominee's greater volume per acre. But he then computed board feet per acre over the entire forested area, including the noncomparable half. Mr. Miller then based his adjustments on all the forest area in Sale "F", although only half had been deemed comparable by Mr. Steigerwaldt.

152. Sale "G" involved 25,000 acres in northern Marquette County, Michigan in December 1969. The tract has frontage on several lakes, rivers and creeks but was purchased for its sawtimber, with plans to sell off the recreational land. Mr. Steigerwaldt's opinion stated with respect thereto:

The 25,000 acres are fairly well blocked and this compared favorably with the Menominee Forest. It has better water resources for the acreage than the Menominee and has a comparable road system. The indicated volume per acre of 1,500 board feet is very much below the Menominee and would not be a good comparable.

However, in making his adjustments, Mr. Miller used a figure of 2,000 board feet per acre rather than 1,500. He also substituted the figure \$1,115,000 for \$1,150,000 in reporting the stumpage inventory value of Sale "G". In comparison with Parcel G, and substituting 1,500 board feet per acre in Mr. Miller's formula, the fair market value of the Menominee Forest in 1961 (after all adjustments and discounts for time) would be \$46,215,000.

[186] 153. None of Mr. Miller's adjustments of the "comparables" under his market data approach take into account the principal difference between the Menominee Forest and the suggested comparables, namely, the acknowledged superior quality of the Menominee timber.

154. Mr. Miller's appraisal is then computed on a weighted average value. The explanation of how the weighted average is achieved is inadequate, nor is there an explanation as to why this weighted average value is then discarded in favor of a "median" figure, which is then rounded off by a reduction of about \$500,000.

155. For the reasons detailed above, it is concluded that the market data approach as implemented by the Miller appraisal is of comparatively little probative value. It employs comparables of questionable validity, and fails to make suitable adjustments as necessary to equalize the differences between the suggested comparables and the Menominee Forest to achieve reasonably accurate appraisal of the latter.

156. The income capitalization approach, used as a check in confirmation of the figure achieved by the market data approach, is also questionable. It assumes a stabilized, inflexible, allowable annual cut of 27,500 MBF (the figure is elsewhere indicated to be 27,800 MBF) based on sustained yield management, although this is supposed to be an appraisal of full market value, without restrictions. Moreover, that cut is less than the annual cut estimated by defendant's Professor Carow *with* sustained yield restriction (*i.e.*, he estimated 30,297 MBF from 1961-71; 32,650 MBF from 1971-80; 35,000 MBF from 1980 to perpetuity). Professor Carow's higher figures are confirmed by those of Mr. Lee Winner, defendant's forester, who had first-hand knowledge of the forest over a number of years, and who had concluded it would annually yield 30,297 MBF of sawtimber, not including growth, and operating within a sustained yield program enforced by the State of Wisconsin.

157. The Banzhaf report had also estimated a considerably higher annual harvest, based on annual growth, plus liquidation of excessive stocking of 296 MMBF over a period of 45 years (three cutting cycles). Banzhaf determined that under sustained yield *prior* to 1961, the annual allowable cut should have been 27,697.2 MBF. To liquidate the excess stocking over a single cutting cycle of 15 years would have required an additional annual cut of 19,733.3 MBF.

[187] 158. The Rickard report estimated a potential annual cut prior to 1961 of 31,200 MBF, based on a conservative reading of overstocking figures taken from defendant's 1961 forest plan. Practicing sustained yield management, he estimated a potential annual cut of 35,500 MBF in the years 1962-71, based on growth, excess inventory and the elimination of "priority" trees which it is acknowledged must be cut because of individual condition. The 1961 Forest Management Plan prepared by defendant's Mr. Winner, approved by the Wisconsin Conservation Commission, notes generally that an overstocked, old, and slow growing forest will generate maximum value by an early accelerated harvest designed to reduce inventories to efficient levels of stocking relative to growth.

159. The Miller income capitalization appraisal not only assumes an annual cut of only 27,500 (27,800 elsewhere) MBF, but it applies a value per MBF based on a formula for computing stumpage for internal book-keeping purposes. Menominee timber was not sold on the open market but was sent to Menominee Mills. The formula did not therefore reflect commercial value on the open market.

160. There was then deducted estimated administrative costs of forest management under sustained yield (which were deemed higher than management costs under liquidation alternatives), plus taxes under the Wis-

consin Forest Crop Law, to determine projected annual income. This was then capitalized at only 2.5 percent as a "raw material evaluated on a residual basis at a low rate of capitalization." The rate was also justified on the grounds that "agricultural lands of any type are usually sold on low interest rates, much lower than other types of property. \* \* \* Mr. Miller also used the sales data collected under his market data approach, as above detailed and analyzed, to confirm his income capitalization rate. The income capitalization approach is then used to confirm the previously developed market data approach and appraisal. He testified:

When this figure [taxes, maintenance and administration cost] is deducted from the estimated realized return from the harvest, that is, the dollar realization, it's a very [188] simple matter of dividing the net annual income by the sale price and it will give you the capitalization rate or interest rate on which that property sold.

It is not valid to determine the income capitalization rate of the Menominee Forest on the basis of other forest properties, the sawtimber income of which was not comparable to that of the Menominee Forest.

161. Plaintiffs' witness, Dr. Harkin, testified that the rate of return on investments in agricultural land is substantially higher than the 2.5 percent used by Mr. Miller. Including capital gain income, which other expert opinion holds should be included in determining the total income producing capacity of land, he found the net average return on investment in agricultural land was 7 percent for the period 1949-68. He attributed the comparatively low rate of actual return of the Menominee Forest to prior mismanagement and overstocking.

162. For the foregoing reasons, it is concluded that the income capitalization approach employed to check

and confirm the Miller appraisal based on a market data approach, is also of comparatively little probative value.

163. Based on all of the evidence of record, it is concluded that the fair market value of the Menominee Forest as of April 1961, and without restrictions, was \$38 million. The Banzhaf appraisal of \$39,893,680, and the Rickard appraisal of \$38,456,900 are clearly more reliable than the Miller appraisal of \$32 million (elsewhere stated as \$31 million) for all of the specific reasons detailed above. Dr Harkin did not independently appraise the Menominee Forest, but expressed an opinion in favor of the Rickard appraisal because it developed stumpage value based on actual sales of Menominee timber, less milling and logging costs.

164. Plaintiffs urge a fair market value of \$39,200,000 as the approximate average of the Banzhaf and Rickard appraisals. Both such appraisals are conservatively developed, with a number of safety factors used in lieu of discount, to reduce the original figure estimated in the Banzhaf appraisal; and a discount to present value approach in the Rickard appraisal. It is nevertheless concluded that this average figure, derived [189] from two well-documented and conservative appraisals, should be further reduced because it is not free of doubt that the safety factors employed in the Banzhaf appraisal would fully account for discount. Similar doubts exist as to whether the milling and logging costs deducted from veneer and rough lumber prices in the Rickard appraisal, would be the same costs generally available to any purchaser of the forest.

165. The resultant figure of \$38 million (finding 163) is in any event not far removed from the Miller appraisal, despite the absence of a number of essential adjustments which have been omitted in that appraisal as above detailed. Properly adjusted, the Miller appraisal would equal or exceed \$38 million. Although the "com-

parables" employed are not comparable in quantity of timber (insufficiently adjusted) or quality (not adjusted at all), Mr. Miller nevertheless achieves a "weighted average value" of \$35,430,000 for the Menominee Forest which he then inexplicably reduces. Moreover, to reach that figure two adjustments are made which are unwarranted. Sale "H" is given a 6 percent upward adjustment for location, a credit for which there is no support in the record. Sale "D" is given an unwarranted credit of 10 percent for forest ratio. Without those unwarranted adjustments, his "weighted average value" for Menominee would be \$36-\$37 million, and with proper adjustments for quantity, quality, and location, as a single parcel, his appraisal would equal or exceed the \$38 million figure found above, as it in fact does when the comparison is limited to the most comparable Sale "D". The income capitalization approach used to confirm the Miller appraisal is unpersuasive for the reasons above detailed. Both the projected annual cut of 27.8 MBF and the estimated value of \$29 per MBF are too low, and lack support in the record. Furthermore, it is an approach which is based on the earnings of a particular management, and this may not reflect the actual value of the property under improved management.

#### APPRAISAL OF FAIR MARKET VALUE OF THE MENOMINEE FOREST WITH AN IMPOSED SUSTAINED YIELD RESTRICTION

166. Sustained yield forest management is defined generally as dedication of a forest property to the permanent production of forest products in the form of saw logs, pulpwood, or some other product or combination of products. It is the management or planning of forest production so that it is [190] perpetual and continuous, but not necessarily at an even rate. Within this generalized definition there is considerable diversity of application. Continuous growth can be achieved by selective



cutting, as practiced in the Menominee Forest, or by clear-cutting portions of the forest and replanting, thus regenerating those portions so that they remain permanently productive. Defendant's appraiser, Mr. Miller, quoted the sustained yield definition of the Society of American Foresters:

Management of a forest property for continuous production with the aim of achieving at the earliest practicable time approximate balance between net growth and harvest, either by annual, or somewhat longer periods.

167. The sustained yield management practiced by defendant on the Menominee Forest while under its trusteeship under the 1908 Act was not necessarily a scientific application of sustained yield management. It inflexibly limited the annual cut to 20 MMBF, without regard to actual inventory or growth. These circumstances are the basis for a subsequent claim in this series entitled "Forest Mismanagement." Flexibility is essential to good forest management. Commercial foresters require flexibility in order to practice sustained yield while at the same time taking advantage of market fluctuations and other important economic considerations. Sustained yield as practiced commercially, permits management to establish an annual cut at its most efficient level at the time, in terms of a particular management's objectives. An owner establishes his own management plan, including self-imposed limitations on the cutting of the timber in the forest, but these plans, while governing the general nature of the annual harvest, can be quickly and readily adjusted by the owner to meet market fluctuations, changed conditions in the forest, and forest utilization advances. If the financial well-being of an owner so requires, he can adjust the sustained yield forest plan significantly in order to permit the sale of timber, or land and timber, in a manner that will produce revenues

when most needed, and can offset this, if necessary, with reductions in annual cut when market conditions warrant.

168. In contrast, the sustained yield requirement imposed upon the Menominee Forest was quite inflexible. The [191] Forest Management Plan which MEI was obliged to prepare could not be put in effect nor changed without state approval. Under the terms of the deed from defendant, the state could enjoin any deviation from the plan, or interpretation of the plan with which it disagreed. Under the plan, management of the forest is not wholly vested in its owners. Supervisory control over management is lodged in the State of Wisconsin. MEI cannot decide on a change in cutting patterns and promptly put it into effect. Changes in the membership of the State Commission can result in modifications of approvals previously given by the state. The interest of the state in preserving the aesthetics of the Menominee Forest for all of its citizens, constitutes a conflict with the best economic interests of the owners of the forest, and the state would be unlikely to approve a plan for a temporary high harvest in excess of growth, or a radical change in an existing plan to take advantage of a high market in a particular species, or to adjust to a low market in a specific type of timber, or to satisfy an urgent cash need, or to effectuate a required reduction in excessive stocking. MEI is even prohibited from departing from this relatively inflexible sustained yield management plan in a situation where there is no market for its hardwoods, nor could it deviate presumably even to avoid bankruptcy.

169. The relatively inflexible sustained yield management requirement imposed in the deed, coupled with external, governmental, non-owner regulation of the owner's prerogatives reduced the fair market value of the Menominee Forest, and specifically its value to a prospective purchaser. Defendant's argument that the deed restriction resulted in no diminution whatever in

fair market value, because a prudent owner would practice sustained yield management, is untenable. It ignores the distinction between the general commercial concept of sustained yield management in a particular owner's best economic interest, and the relatively inflexible sustained yield management imposed in this case, coupled with external, governmental, non-owner regulation of the normal commercial prerogatives of the Menominees or of a purchaser from the Menominees.

170. The Menominee Forest represents 10 percent of the total standing timber in the State of Wisconsin. It is the largest hardwood forest in the state. This was the basis for the state's insistence on a sustained yield restriction [192] enforceable by state injunction. The 1961 forest plan, prepared by defendant in cooperation with the Wisconsin Conservation Commission, was based on a scheduled harvest that would remove excess inventory plus priority trees. In doing so, however, it provided no allowance for annual growth. The effect was to once again create an excess inventory problem. Under the plan, harvest was limited to certain prescribed areas each year, and cutting priorities prescribed were unrelated to market conditions. Authority to fully, freely develop the recreational potential of the forest was limited by the state's right to control the withdrawal of specifically limited acreage from the forest only on a showing of a higher economic use for the parcel to be withdrawn. These restrictions are consistent with preservation of the Menominee Forest as a public aesthetic asset, and with plans which at one time contemplated state or federal acquisition of the forest as a park. They are inconsistent with sound commercial management of the forest and maximum utilization of its economic value in the best interests of the owners.

171. In measuring the value of the flexibility implicit in a sustained yield management program matched to an owner's economic interests, plaintiffs' appraisal ex-

perts based their computation not on total liquidation as defendant assumes, but on an annual allowable cut equal to annual growth, plus a harvest of excess standing inventory and high priority trees. This provides the minimum value of the discretion vested in a prospective purchaser to recoup his investment as quickly or slowly as circumstances dictate. This was an allowable cut, found by plaintiffs' experts to be perpetually sustainable, and it was not a total liquidation program which some prospective purchasers might find feasible. For example, Mr. Banzhaf observed that without the sustained yield restriction in this deed, the Menominee Forest could be purchased by a paper mill with a plan to harvest all sawtimber in order to recoup the initial investment as rapidly as possible, at the same time converting the forest to pulpwood which is more profitable because harvested at shorter intervals. This would fall within the definition of sustained yield management with commercial flexibility, but it would not be permissible under this sustained yield deed restriction as administered by the state, a restriction which is unique to the Menominees and to any successors in interest. Because of various limitations on management such as those above described, Mr. Banzhaf was of the opinion that the market value of the Menominee Forest was reduced by 60 percent from its value without restrictions.

[193] 172. With the sustained yield restriction, Mr. Rickard was of the opinion that a prospective purchaser could value the forest based only on what he was sure the state would permit him to harvest. Testifying as a forest economist, he stated with respect to this deed restriction:

Well, it destroys its flexibility, mainly.

First of all, it puts a rigid limit on what he can do in total, but it destroys flexibility.

In fact, it in effect deprives him of the use of his property, really, because he owns it and he can't use it.

Now other people operate under sustained yield restrictions, but they aren't this kind of sustained yield restrictions.

I mean, many companies operate under plans, strategies referred to as sustained yield, but they are plans and strategies of their own making, which they can change from year to year.

If they find within their enterprise an opportunity to use funds productively that they don't have in cash, they can find those funds in their forest.

\* \* \* \*

[They can find them by] exceeding some average cut. \* \* \*

[The purchaser from the Menominees] couldn't do it. By the same token, he can't accommodate to changes in the market, market prices, forest products market prices, lumber, plywood, veneer, and so on, they are very cyclic, and they are not only cyclic over a period of years, but they are cyclic between species.

The only way to operate property like this and to get the most from it is to have the freedom to bend with the markets, to supply the markets [194] when prices are good, and to not force yourself on the market when prices are bad, when prices for specific items are high, to get the value.

For example, now, the elm markets are good, and Dutch elm disease is in this forest, and there is every reason to get all the elm out you can, right now, even if you overcut, I mean, by some arbitrary figure.

And, in the '60's, for example, the price of butter-nut in this forest had ranged from as low as 30 or 40 dollars a thousand to as high as \$700 a thousand

feet, seven hundred, and they have actually sold butternut on the Menominee for \$700 a thousand.

I mention these just to give you some idea of the variances that are inherent in this business, which a manager has got to take a position to take advantage of, to get the value from the property.

[A purchaser of the forest without restrictions] would be completely free and flexible to manage it in any way that would improve his position, improve his profit position.

\* \* \* \* \*

He could get out, he could sell parts of it and acquire other lands to put together a better forest, considering changes in land use and so forth, or he could go ahead with a perpetual forest management program established—which ordinarily would be established on standards of profitability. I think in most cases that he would adopt standards of inventory based on its efficiency rather than the kind of standards that were adopted by the BIA. They would be lower. After he purchased it, he would have substantially more excess inventory to harvest than we have shown.

173. Dr. Duncan Harkin also testified that the inflexibility and uncertainty of management under this deed restriction would in and of itself reduce fair market value:

[195] The existence of restrictions implies some agency to administer these restrictions so the forest owner operating under such restrictions would continually have to ask himself whether his concept of sustained yield is the same as that of the administering agency.

In effect the owner would have a governmental partner.

174. The above testimony is confirmed by defendant's experience in attempting to sell 11 parcels of the Kla-



math Indian Forest at a time when there was strong demand for the timber in that forest. The parcels were offered under a sustained yield limitation imposed by law, at "realization" value (which was less than appraised fair market value, but more than appraised sustained yield value). Over a 2-year period, only one of the 11 parcels was sold, and the remaining parcels were eventually taken over by defendant for park purposes when they failed to sell. This illustrates the effect upon market value of a sustained yield limitation imposed by law.

175. In quantifying the diminution in market value attributable to the sustained yield limitation imposed by law and implemented by deed of conveyance, the Banzhafs employed two approaches, each based on an annual cut limited to growth. Under a "recovery of investment approach," using an assumed volume per acre in 1961 of 9,000 board feet, and a weighted stumpage value for all species of \$25 per MBF, an acre would have stumpage value of \$225. An annual growth rate of 2 percent is established by dividing annual plot growth, as taken from the 1970 CFI, by total sawtimber plot volume shown in that CFI.

An annual cut limited to growth would therefore have a value of 2 percent of \$225, or \$4.50, and it would therefore take 50 years to recover an investment of \$225 per acre. (The assumed figures are unimportant since these calculations would produce the same result with alternative assumed figures.) The present value of a series of payments of \$4.50 per year for 50 years is determined by discounting \$225 at 5 percent, to \$82.15, which is 36 percent of that 1961 per acre value. The 5 percent discount rate is selected as tied directly to the prime interest rate for commercial loans in 1961 (actually 4½ percent).

[196] 176. In their alternative "capitalization" approach, the same \$4.50 income is capitalized at 5 percent

to achieve a value of \$90 per acre, which is 40 percent of the \$225 per acre utilized under the "recovery of investment" approach.

177. On these bases, the Banzhafs determined that the value of the Menominee Forest at termination, with a sustained yield restriction imposed by law, was 40 percent of \$39,893,680, or \$15,957,472. They conclude that "this figure reflects the fact that MEI does not have control over the total timber volume, but only the growth on that volume." It can be questioned that MEI or its successors would even have total control over "the growth on that volume" since they are regulated not only as to total allowable cut, but also as to when and where that cut may be taken.

178. The Banzhafs used bank rates rather than a capitalization rate based on market data because the latter must be based upon a weighted average of comparable businesses, which is difficult if not impossible to determine. Mr. Banzhaf testified that "market returns reflect extremely local conditions sometimes." He noted further that a potential purchaser can earn 5 percent just by putting his money in a savings account. He rejected the 2 or 3 percent income based upon growth rate as a basis for capitalization, for the reason that this approach fails to reflect that a forest of the size of Menominee is purchased as a "wood resource base" to "supply [inventory] protection," and must therefore be considered in relationship to other investments in determining its value. It is concluded that a prospective purchaser would be justified in expecting an overall return on investment equivalent to the 5 percent payable on a conservative savings bank account.

179. In quantifying the diminution in market value attributable to a sustained yield limitation imposed by law and deed of conveyance, Mr. Rickard assumed an annual cut of about 30,000 MBF, times an assumed value

of \$40 per MBF, to estimate annual anticipated income of \$1,200,000. He capitalized that income at 10 percent to compute a value (under sustained yield of this type) of \$12 million. That is the top price he would recommend were he serving as a consultant to a prospective buyer. Mr. Rickard reasoned that a buyer [197] would not know how the state regulating agency would define "sustained yield," but that he could reasonably expect that cut would be limited to no more than growth. If actual figures are substituted for Mr. Rickard's assumed figures (28,700 MBF a year, times \$43.70 average sawtimber value per MBF), the result is quite close to the one he assumed, namely \$1,254,190 in income per year, and a capitalized value of \$12,541,900.

180. Mr. Rickard capitalized at 10 percent on the basis of his own experience as a forest economist. That experience indicated that for this type of industry, a reasonable expectation of productivity is 10 percent after taxes. He used the 10-year period as the period which a prospective purchaser would use to determine how much he could afford to pay for a forest based upon recoupment of investment. He concluded that 10 years is a yardstick used for determining how much a prospective purchaser can afford to pay for a property he is contemplating buying.

181. Dr. Duncan Harkin also favored a 10 percent capitalization rate over the 5 percent rate used by the Banzhafs. He noted that the capitalization rate is especially important in comparing the difference between the retail value of a forest, and its value under sustained yield "because the differences depend upon capitalizing the income available from the sustained yield forest." He felt that:

[T]he Banzhaf use of the 5 percent rate is rock bottom. The Menominees had at least this alternative of obtaining this rate of interest on their money.

I think the more relevant rate, however, was that used by Rickard because of potential opportunities for investment in the veneer mill, improvement of the sawmill.

It has been indicated that investments in these sorts of things yield rates of interests 8 to 12 percent after taxes and 10 percent as the midpoint.

182. Other witnesses confirmed the above appraisals to the effect that the forest with this relatively inflexible [198] and externally managed restriction, would be worth only 31-40 percent of its value absent that restriction.

Mr. Robert E. Kleiner, a consulting forester and appraiser testified as a rebuttal witness for plaintiffs, on extremely short notice, following defendant's expert testimony in this case to the effect that a sustained yield restriction of this type would not diminish the value of a forest at all. He is President of Western Timber Service, Inc., a firm previously employed by defendant to appraise the Klamath Indian Forest. His assignment for defendant was to appraise the Klamath Forest to determine the fair market value of that forest "and in addition we were to make an analysis of the value if the property were operated on a sustained yield basis. \* \* \*" Mr. Kleiner's firm had also been retained by defendant to make an appraisal of the "realization value" of the Klamath Forest. This was a measure of value less than fair market value, because of certain restrictions imposed on the sale, but it was more than the sustained yield restriction value since the purchaser under the definition of "realization value" was not required to operate it under a sustained yield restriction.

183. Mr. Kleiner's firm submitted an appraisal to defendant of \$138 million for fair market value, \$123 million for realization value, and only \$43 million for the sustained yield value of the entire Klamath Indian For-

est. The sustained yield value he determined was only about 32 percent of fair market value, and only about 35 percent of realization value. Mr. Kleiner's appraisal report was accepted by the Secretary of the Interior in that case.

184. As earlier mentioned, the Klamath Forest was later divided into 11 parcels for sale subject to a sustained yield restriction. However, the tracts were not to be sold at less than realization value. Of the 11 tracts offered, only one was sold. It was Mr. Kleiner's opinion that the tracts did not sell because:

A buyer who had to operate under sustained yield restrictions could not justify the realization price. It was too high under those conditions. Without those conditions I believe those units would have sold for the realization price or higher.

[199] 185. Mr. Kleiner's determination that there would be a 68 percent diminution in fair market value of the Klamath Forest by reason of a sustained yield restriction, lends support to the opinions of plaintiffs experts who concluded that the sustained yield restriction on the Menominee Forest reduced its value by 60 to 70 percent.

186. Mr. Kleiner's conclusion is confirmed by Mr. George Weyerhauser, of the Weyerhauser Timber Company, in his testimony in 1957 at a congressional hearing on the Klamath Termination Act. He testified that:

Whoever purchases the timber cannot afford, as a timber owner, to practice sustained-yield forestry if he is required to pay the present liquidation value of the timberlands.

His testimony sought to assure the right of private foresters to purchase the Klamath Forest. To establish that right in a manner acceptable to conservationists (who feared that private operation would destroy the

forest) Mr. Weyerhaeuser pointed out that sales could be made with a sustained yield restriction. However, he proposed that in that event, the Klamath Indians' right to be paid full market value for their property could be satisfied by the Government's payment to them of the difference between full market value, and market value with a sustained yield restriction.

187. There are other indications that the market value of the Menominee Forest was drastically reduced by imposition of state-administered sustained yield restrictions. Mr. George Kenote, a Menominee and member of the Coordinating and Negotiating Committee, had occasion to test the market when a number of tribal members were urging total liquidation of tribal assets as an alternative solution for the problems confronting the tribe as a result of termination. The Calumet and Hecla Corporation, Goodman Lumber Division, was a large neighboring lumber company. Its representatives were of the opinion that they could not pay any more than 30 percent of market value if obliged to comply with a sustained yield limitation that would require 50-75 years to harvest the stumpage volume then present.

188. A Mr. Donald Knight, Professor of Commerce at the University of Wisconsin and a member of the group of business consultants to MISC, also made a determination of the market [200] value of the Menominee Forest with the sustained yield restriction. Using a capitalized income approach, he reached a value of \$10,300,000 as against his full value appraisal of \$31,301.721, i.e., he concluded that the value of the forest with the restriction was approximately 33 percent of the value he had determined without the restriction.

189. A former state senator and member of MISC, Hugh M. Jones, when considering the Forest Tax Bill, excepted to the assumption in that bill that the value of the forest with the restriction was 40 percent of its value



without restriction. He wrote the Attorney General reminding him that "the testimony everywhere is that the value of a sustained yield forest is 30% to 40%," and noted a preference for 33½ or 35 percent.

190. Defendant objects to comparison of the stumpage value of the land without restriction with its value under restriction computed by the income capitalization method. It argues that the drop in value results from the change in appraisal method, citing its expert, Professor Carow. The latter also assumed growth of 2 percent annually, and a 5 percent interest (or capitalization) rate, and came up with a value of \$16,654,000 under a 20-year *liquidation* plan, and a value of \$17,713,000 under sustained yield. This leads defendant to conclude that the value of the land with or without the sustained yield "feature" is the same.

191. Defendant agrees that the deed restrictions "were included for the benefit of the State of Wisconsin" but argues that this was:

at the request of the Menominees and the mutual consent of them and the United States. The reference in the covenant to the Wisconsin scheme for sustained yield taxation implies a special collaboration between the Federal, state, and tribal representatives to protect the resources of Menominee County from waste or exploitation.

192. Defendant further argues that:

[T]he sustained-yield imperative is not applicable to forest areas "released therefrom under the laws of Wisconsin in a manner prescribed [201] by the tax law, including,

(11) The owner may, without approval \* \* \* withdraw from taxation under this section, any parcel \* \* \* not more than 10 acres in size. Such withdrawals shall not total more than 250 acres in any calendar year.

(12) Withdrawal of any parcel of land larger than 10 acres in size, or any withdrawal which results in a cumulative total of more than 250 acres withdrawn in any one calendar year, shall require the approval of the commissioner of taxation. \* \* \* Any withdrawals under this section shall be made only for the purpose of dedicating the lands to a higher beneficial use. \* \* \* The commissioner of taxation may require such assurances from the owner as he deems necessary to guarantee that the lands will be dedicated to a higher beneficial use.

193. It is the opinion of defendant's experts "that since the appropriateness of applying sustained yield management is obvious, it makes no difference that it is required by deed covenant.\* \* \*" They therefore conclude that the sustained yield covenant cannot be the cause of any diminution in the value of the forest. It is argued:

This measure is simply a safeguard built into the termination plans in order to prevent exploitation and waste of the Menominees' resources, and, further, to provide a supervisory review of any action which would tend to separate the Menominees from their forest lands. It seems reasonable to assume that prudent business transactions contemplated by Menominee Enterprises could not (and probably would not) be blocked by an arbitrary or capricious action of Wisconsin State officials. \* \* \* Alternatively, defendant argues that no injury is sustained under the restriction until and unless Menominee Enterprises attempts to sell free of the deed covenants the land to a *bona fide* prospective buyer and are denied permission to sell.

This is circular reasoning since it assumes that one could find a buyer for the land encumbered with those restrictions.

[202] 194. Defendant's appraisers conclude that:

All of this data reinforces our opinion that a sustained yield provision causes no diminution in value. Rather, it tends to enhance the value of a forest

\* \* \*

195. It is concluded that there is no support for this opinion of defendant's experts that there was no diminution in value, and in fact an enhancement in value, by reason of the sustained yield restriction imposed. The opinion is based on market data to the effect that tracts with a history of sustained yield management have in fact been profitably sold. But the tracts involved in those sales were being operated under sustained yield management plans developed by management itself, and voluntarily installed in the best economic interests of the owners. In contrast, this case involves an involuntary sustained yield restriction, externally imposed, and administered by the state. The only market data evidence directly relating to a similar sustained yield restriction was that developed for defendant with regard to the Klamath Forest as earlier described, and in that instance, purchasers were not interested, and virtually no sales were consummated, although the forest was otherwise very attractive to prospective purchasers.

196. Furthermore, the opinion of defendant's experts is based on a comparison of the value of the forest under sustained yield, with its value under a total liquidation plan over 10 or 20 years. Liquidation is not the sole alternative to an involuntary sustained yield restriction externally regulated by the state. The latter should properly be compared with the flexible, voluntary management programs available to an owner seeking to operate the forest in his own best economic interest.

197. In appraising the Menominee Forest under a total liquidation plan, moreover, defendant's experts reduced by 70 percent the stumpage values which had been

found by the Bureau of Indian Affairs, and this is unwarranted and not supported by the record. Furthermore, they assigned no value to the land following liquidation, although it would have sale value for reforestation or other use.

[203] 198. In contrast, plaintiffs' method of appraising the reduced value of the forest under an involuntary, state-regulated sustained yield restriction, is logical and credible. Use of an income capitalization approach to determine the diminished value of a forest under involuntary, inflexible and externally regulated sustained yield is proper in these circumstances since annual income is the only incident of ownership available to the Menominees or to their successors or assigns under such a restriction. Circumscribed and restricted annual income is the sole means by which an initial investment could be recovered by a purchaser. The results produced by an income capitalization approach, furthermore, are confirmed by the only relevant market data evidence produced by either party, namely the unsuccessful attempt to sell the 11 tracts comprising the Klamath Forest under similar restriction.

199. Plaintiffs' experts concluded that the market value of the Menominee Forest was reduced by from 60 to 70 percent by imposition of this type of sustained yield restriction. The most conservative of these appraisals was that of the Banzhafs who would place a value of 40 percent (of its value without restriction) on the forest subject to this sustained yield restriction.

200. It is concluded that the fair market value of the Menominee Forest with this sustained yield restriction is 40 percent of \$38 million (its market value without restriction, finding 163 *supra*). This results in a market value of \$15,200,000 for the forest under the sustained yield restriction imposed in the deed to plaintiffs.

APPRAISAL OF FAIR MARKET VALUE OF THE MENOMINEE  
FOREST WITH THE ADDITIONAL 30-YEAR RESTRICTION  
AGAINST SALE OR ENCUMBRANCE

201. To evaluate the further effect on market value of the Menominee Forest of the additional 30-year deed restriction on sale or encumbrance, it is necessary to start with its market value under the sustained yield restriction, because the latter restriction continues in perpetuity and thus embraces the 30-year restriction on sale or encumbrance.

[204] 202. The Banzhafs conclude that this restriction rendered the Menominee Forest virtually unsalable for 30 years. They computed its further reduction in value by reason of this restriction as being about \$7 million. This is determined by taking the Banzhaf appraisal of market value under the sustained yield restriction (\$15,957,472), and increasing it at the rate of 3 percent per year compounded for 30 years to account for normal increase in the value of the timber for that period. This figure (\$38,732,933), represents the value of the Menominee Forest in 1991, and that value is discounted at an interest rate of 5 percent for the 30 years during which it would not be sold and during which the purchase price would lack investment value.

203. Mr. Rickard, testifying as a forest economist advising a prospective purchaser, was of the opinion that a purchaser would have to keep the forest for 30 years while the costs of ownership continued. Therefore a purchase with this restriction would be a "terrific" gamble even if purchased for half its value under sustained yield restriction.

204. Here again, defendant's response is that the 30-year restriction against sale or encumbrance results in no diminution in market value because:

[T]he deed restriction does not apply to lands released from sustained-yield basis under the laws of

Wisconsin. Any parcel, regardless of size, may be withdrawn from sustained-yield taxation—and thereby released from deed covenants—if that parcel can be utilized for “a higher beneficial use.”

\* \* \* \* \*

Alternatively, defendant argues that no injury is sustained under the restriction until and unless Menominee Enterprises attempts to sell free of the deed covenants the land to a *bona fide* prospective buyer and are denied permission to sell.

205. These arguments have previously been found to be unsupportable in connection with the findings on the sustained yield restriction. Defendant's experts themselves were of the opinion that the highest and best use of the Menominee [205] Forest was as an industrial forest. Therefore it would be difficult, if not impossible, to convince the State Conservation Commission which was vested with authority to rule on such matters, that withdrawal of a parcel should be permitted for a “higher beneficial use.” Litigation would probably be required, with the outcome very much in doubt. Moreover, if withdrawn at the rate of not more than 250 acres per year, as permitted without demonstrating a higher beneficial use, it would take more than 900 years to remove this total acreage from the forest. The history of these restrictions and the reasons underlying them illustrate that withdrawal from them would not be easily attained.

206. The alternative argument begs the question, as earlier observed. It assumes that a prospective buyer would offer to buy the property in the hope that the sale would not be frustrated by the restriction against selling the property.

207. It is the Banzhafs' opinion that the 30-year restriction against selling further reduced the market value of the Menominee Forest by about \$7 million. Mr. Rickard's corresponding figure is about \$6 million, the



average being \$6.5 million. It is concluded that the effect of this restriction is to reduce the fair market value of the Menominee Forest by \$6.5 million, namely, from \$15,200,000 to \$8,700,000. That is the fair market value of the forest encumbered by both deed restrictions.

208. The plaintiffs also argue that the fair market value of the Menominee Forest as determined without the deed restrictions, should be increased by the value of the exemption from both state and federal taxes which the Menominees had enjoyed prior to termination. The Banzhafs conclude that the exemption from state property taxes alone (and without regard to state and federal income taxes) would increase the value of the forest by \$9,665,000.

209. This argument is rejected. It appraises the property not by a general test of market value, but by a comparison of its value to this tax-exempt owner with its value in the hands of any other owner subject to taxation. Moreover, it assumes a continuation of exemption from taxation, contrary to the provisions of the Menominee Termination Act.

[206]                   ULTIMATE FINDINGS ON DEED  
                              RESTRICTIONS CLAIM

210. Defendant is accountable to plaintiffs for damages by reason of the imposition of restrictions in the deed of the Menominee Forest, with consequent reduction in the market value of the forest. This was in breach of defendant's fiduciary obligation to plaintiffs to insure that the property turned over to plaintiffs at termination would reflect the full market value of the property.

211. Plaintiffs are also entitled to recover on the alternative grounds asserted, namely, a fifth amendment taking. Their right to administer, sell or encumber their forest without statutory or deed restrictions is a property right protected by the fifth amendment, measured by a comparison of before and after values. There was not in

this case a good faith effort to give plaintiffs their land or the full value thereof. Throughout the termination proceedings there was an intermingling of the best economic interest of plaintiffs with those of "all of the people of Wisconsin and this country."

212. The damages suffered by plaintiffs is the difference between the fair market value of the Menominee Forest as of April 1961, without restrictions, and its value as of that date with both this sustained yield restriction and the 30-year restriction against alienation or encumbrance. This difference is:

Market value without restrictions	\$38,000,000
Market value with both restrictions	8,700,000
Damages	<u>\$29,300,000</u>

Plaintiffs are entitled to judgment on this deed restrictions claim in the amount of \$29,300,000 by reason of defendant's breach of its fiduciary obligation to plaintiffs or, alternatively, on the grounds of a fifth amendment taking.

### CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that [207] plaintiffs are entitled to recover the sum of Twenty-nine Million Three Hundred Thousand Dollars (\$29,300,000), either as damages for breach of a fiduciary duty, or alternatively, as compensation for a fifth amendment taking, with interest as required by law, and judgment is entered for plaintiffs accordingly.

197a

APPENDIX II

IN THE

**United States Court of Claims**

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TRIAL DIVISION

No. 134-67-B

(Forest Mismanagement)

[Filed: April 4, 1980]

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THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902

v.

THE UNITED STATES

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Indians; mismanagement of tribal property while under federal supervision, control and protection; trust or fiduciary relationship and breach of fiduciary duty by those individuals invested with management responsibility; jurisdiction of court over claim for breach of fiduciary duty; evaluation of expert testimony and reports; meas-

ure of damages incurred in pre-termination and post-termination periods; disposition of claim tantamount to claim for interest; statute of limitations; date of accrual of claim for breach of fiduciary duty; fifth amendment taking issue.

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*Angelo A. Iadarola*, attorney of record, for plaintiff.  
*Frances L. Horn, R. Anthony Rogers, Philip A. Nacke, Wilkinson, Cragun & Barker*, of counsel.

*Richard L. Beal*, with whom was *Assistant Attorney General Kent Frizzell*, for defendant.

#### OPINION \*

[2] SPECTOR, *Trial Judge*: This case involves one of a large and complex series of claims brought by the plaintiffs. It concerns a charge of mismanagement of the Menominee Forest by defendant for a 10-year period beginning July 10, 1951. Two earlier opinions have treated with other aspects of plaintiffs' claims. The "basic" opinion herein analyzed in depth the history and consequences of termination by the Federal Government of its supervision and control over plaintiffs and their assets.<sup>1</sup> The "deed restrictions" opinion was the first involving a claim for damages.<sup>2</sup> It dealt with the economic impact of restrictive covenants in the deed convey-

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\* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

<sup>1</sup> Basic opinion Docket No. 134-67, filed July 19, 1978. That opinion did not relate to a claim for money judgment and it was published to provide historical background for the claims to follow. It was not contemplated that it would be reviewed independently of an opinion on a claim for a money judgment. However, defendant sought review of the "basic opinion," and in a decision dated October 17, 1979, the court vacated it with instructions. *Menominee Tribe of Indians v. United States*, 221 Ct. Cl. —, 607 F.2d 1335, petition for cert. filed 48 U.S.L.W. 3480 (1979).

<sup>2</sup> Docket No. 134-67-A (Deed Restrictions), filed March 22, 1979.

ing plaintiffs' land to them following termination of federal supervision and protection.

In this case plaintiffs seek redress for defendant's alleged mismanagement of the Menominee Forest from the date an earlier Menominee litigation was settled (*Menominee Tribe of [3] Indians v. United States*, 118 Ct. Cl. 290 (1951)) to the termination of federal control and supervision on April 29, 1961. Plaintiffs also allege that the damages inflicted during defendant's final decade of forest mismanagement unavoidably continued to impact upon the post-termination period. Therefore damages are sought for a total period beginning in 1951 and continuing through the date of trial.

#### I. JURISDICTION OVER THIS FOREST MISMANAGEMENT CLAIM

The jurisdiction of the court has been invoked under 28 U.S.C. § 1505 (1976).<sup>3</sup> In its review of the "basic" opinion in this case,<sup>4</sup> the court held generally that it lacked jurisdiction under § 1505 "to entertain the non-

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<sup>3</sup> 28 U.S.C. § 1505 provides:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

The court's basic jurisdiction as incorporated in the above section, is set forth in 28 U.S.C. § 1491, in pertinent part as follows:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

<sup>4</sup> See note 1, *supra*.

constitutional claim that the enactment of the [Menominee] Termination Act of 1954 [4] was a breach of trust by Congress for which plaintiffs can obtain monetary relief.”<sup>5</sup> The opinion then enumerates the types of claims that are jurisdictionally permissible.<sup>6</sup>

The claim of forest mismanagement presented in this case does not rest in any way on the enactment of the Menominee Termination Act. It is founded, rather, upon defendant’s alleged breach of a fiduciary duty arising out of its management of the Menominee Forest for the 10-year period *prior* to termination. The claim would be no different had termination of federal supervision and protection never taken place. Passage of the Termination Act is remotely relevant only to the extent that it determined the cutoff date of defendant’s management, and that plaintiffs’ claim of mismanagement is based on the period when their forest was under defendant’s management.<sup>7</sup>

[5] The claim herein is founded in the first instance on a series of treaties, the most important of which is

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<sup>5</sup> 607 F.2d at p. 1343. The enactment of the Termination Act alone had not been urged by plaintiffs as the basis of a claim for monetary relief, nor was it so treated in the “basic” opinion of the trial judge which was, as previously stated, devoted to historical background.

<sup>6</sup> Namely:

“(a) claims said to arise under the Constitution; (b) claims that the Interior Department violated the Termination Act in the respects left open by the preceding discussion in this opinion; (c) claims that the Interior Department violated other statutes in its dealings with the Menominees; and (d) the specific claims set forth in note 2, *supra*, [setting forth all nine claims of the original petition] insofar as they do not rest on Congress’s (or the Interior Department’s) alleged breach of fiduciary duty *through the passage and enactment of the Termination Act.*” [Emphasis supplied]. 607 F.2d at p. 1347.

<sup>7</sup> See and cf. note 6, *supra*.



the Treaty of Wolf River.<sup>8</sup> That treaty, in an exchange of acreage, ceded certain lands to the Menominees and stated that the lands were to be held "as Indian lands are held." It initiated a trust relationship and established from that time forth the Government's responsibility to manage the Menominee property and assets for the benefit of the Indians, as in the case of any trustee or other fiduciary.

An additional jurisdictional basis grows out of the unbroken period of 107 years following the Treaty of Wolf River during which defendant in fact exercised exclusive control over the Menominee Forest. Although some of plaintiffs' tribal members were employed in various capacities in the forestry and mill operations, management of the Menominee Forest never left defendant's control during that long period.<sup>9</sup>

[6] Long prior to and throughout the period here in dispute, defendant established Menominee Forest management policy through a series of forest management plans. There is no suggestion in the record that plain-

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<sup>8</sup> Art. 2, 10 Stat. 1065 (1854). For a discussion of earlier treaties between the tribe and the United States see *Menominee Tribe of Indians v. United States*, 179 Ct. Cl. 496, 501-02, 388 F.2d 998 (1967), *aff'd* 391 U.S. 404 (1968).

<sup>9</sup> The University of Wisconsin Bureau of Government (Preliminary Report to the Menominee Indian Study Committee (1956), at pp. 14-15, 29, P. Ex. R-42), summarized defendant's control of the reservation as follows:

"In large measure the Bureau of Indian Affairs in the past maintained and accepted a 'cradle to the grave' responsibility including not only control in the usual governmental spheres but also in the management and development of the forest resources, the lumber mill, and other employment and income opportunities open to Reservation residents. Governmental officials and other outside individuals held all positions of responsibility and decision making \* \* \*. The National Government continues to supervise forest and mill operations and to retain final approval for all proposed expenditures of Tribal moneys."

tiffs had any active role in the formulation of that policy. This long standing relationship, and the conduct of the parties, both illustrate that the parties considered themselves to be in a fiduciary relationship and that defendant was obligated thereunder to manage the forest for the benefit of the tribe. Such a long standing course of conduct, therefore, gave rise to a contract implied in fact in recognition and confirmation of the fiduciary relationship which had developed between the parties.

The court has frequently recognized its jurisdiction over contracts implied in fact.<sup>10</sup> An implied contract is inferred from the conduct of the parties. It is a contract which recognizes and confirms their tacit understanding.<sup>11</sup> The court's [7] basic jurisdiction in contract cases under 28 U.S.C. § 1491 has been fully incorporated into 28 U.S.C. § 1505 governing jurisdiction over Indian claims.<sup>12</sup> Thus the breach of trust alleged herein would, if established, also constitute a breach of a contract implied in fact.

A third jurisdictional basis may be constructed on the alleged breach of trust implicit in the Act of March 28, 1908, 35 Stat. 51. The 1908 Act authorized the Secretary of the Interior to cut on the Menominee Reservation the "dead and down timber and such fully matured and ripened green timber as the forestry service shall designate," not to exceed 20 million board feet (hereinafter "MMBF") per year. By reason of the congressional enactment of a special jurisdictional statute<sup>13</sup> and by the

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<sup>10</sup> Under 28 U.S.C. § 1491. See, e.g., *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926); *Cities Service Gas Co. v. United States*, 205 Ct. Cl. 16, 23, 500 F.2d 448 (1974).

<sup>11</sup> *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923).

<sup>12</sup> See note 3, *supra*.

<sup>13</sup> Act of September 3, 1935, ch. 839, 49 Stat. 1085, as amended by Act of April 8, 1938, ch. 120, 52 Stat. 208. By its enactment

decisions of this court which followed its enactment, the 1908 Act has been consistently interpreted as creating a trust in favor of the Menominee Tribe and as imposing upon defendant as "guardian and trustee" of the forest the duty to manage the forest in accordance with the principles of "sustained yield," and to exercise "good faith, diligence, care and prudence" in [8] its management.<sup>14</sup> The alleged breach of this implied statutory trust is therefore a third ground supporting jurisdiction over this claim of forest mismanagement.<sup>15</sup>

## II. HISTORY OF DEFENDANT'S MANAGEMENT OF THE MENOMINEE FOREST

### A. *Period Prior to July 10, 1951*

As outlined in the preceding section of this opinion, the defendant held fee title to the Menominee Forest in trust for the benefit of the tribe from the 1854 Treaty of Wolf River, until termination of federal supervision and protection in 1961. Under the Act of June 12, 1890,<sup>16</sup> and

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of this jurisdictional statute, Congress acknowledged that the 1908 Act imposed specific fiduciary responsibilities upon defendant in its management of the Menominee Forest. After granting jurisdiction to the Court of Claims over claims of maladministration of the Menominee Forest, section 3 of the jurisdictional act provides, in relevant part:

"At the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary. \* \* \*"

<sup>14</sup> *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442, 507-08, 91 F.Supp. 917 (1950). The 1950 decision required that defendant's agents manage the forest as a "commercial or industrial enterprise," just as they would conduct "their own businesses or private affairs." *Id.* at 508.

<sup>15</sup> See *Mitchell v. United States*, 219 Ct. Cl. —, 591 F.2d 1300 (1979); *cert. granted* 99 Sup. Ct. 2880 (1979); *Duncan v. United States*, 220 Ct. Cl. —, 597 F.2d 1337 (1979).

<sup>16</sup> 26 Stat. 146.

the previously cited Act of March 28, 1908, Congress imposed an annual timber harvest restriction of 20 MMBF on the Menominee Forest. Except for [9] temporary waivers of that limitation due to extraordinary forest conditions which had developed in a few isolated instances,<sup>17</sup> the restriction remained in effect and unchanged until 1956, when it was raised by 2 MMBF.<sup>18</sup> The 1956 increase, was, however, limited to the harvest of forest byproducts, and it could not be used for additional (and more valuable) sawlog harvest.

The first Menominee Forest 10-year cutting plan was initiated in 1938. It served to introduce a system of selective cutting in certain portions of the forest. However, the annual harvest levels in that 1938 plan were established by reference to a forest inventory dating way back to 1914. The available inventory data vastly underestimated the actual Menominee Forest inventory. As a result, available production so exceeded expectations, that in some areas the cutting cycle could not be completed on schedule.<sup>19</sup>

As early as 1941 a proposal had been made to update the Menominee Forest inventory by means of the "strip cruise" sampling method.<sup>20</sup> However, the Government's then forest supervisor, [10] Delaney, rejected the proposal stating that the additional information would only "becloud and hamper" management of the forest. Eventually in the 1940's, a plot cruise sampling method was

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<sup>17</sup> See Act of March 28, 1908, 35 Stat. 51; Act of March 3, 1911, 36 Stat. 1076; Act of May 31, 1949, 63 Stat. 144.

<sup>18</sup> By the Act of July 14, 1956, 70 Stat. 553.

<sup>19</sup> Cutting Budget for the Second Cutting Cycle, Menominee Indian Forest, dated February 17, 1950, at p. 2.

<sup>20</sup> A "strip cruise" was defined by an expert witness at trial as:

"\* \* \* where in the case of a 10 percent sample, you would run a strip, one chain, or 66 feet wide, twice through the forest, \* \* \*"  
(Tr. p. 172).

instituted, and by 1951, 200 sample plots had been established in the forest.<sup>21</sup> Realizing that the Menominee Forest inventory was incomplete and outdated, the Government's assistant forest supervisor, Winner, made several technical innovations in the collection and analysis of forest data after his arrival in 1948.

In the 1950 Cutting Budget and Management Plan, the then chief forester, Libby, estimated that total timber volume exceeded one billion BF. He also noted that management of the Menominee Forest was being hampered by the 20 MMBF harvest limitation, stating:

\* \* \* it is unfortunate that aspen production is not exempted from legal cutting limitation. Aspen must be cut when ripe or it is lost \* \* \* unless aspen is exempted from legal cutting restrictions, the time is not too far distant when the Menominee Forest will sustain an annual loss of volume in this species because it cannot be harvested as rapidly as it matures. It will be better to lose that volume than to reduce the cut of other more valuable species in order to permit its utilization.<sup>[22]</sup>

[11] Following the 1950 Menominee decision<sup>23</sup> which imposed liability on defendant because of its practice of clearcutting portions of the Menominee Forest, the Bureau of Indian Affairs became very concerned about its management practices. In a memorandum dated December 27, 1950, the chief of the forestry branch concluded that the Menominee Forest could not be managed in a manner consistent with both the 1950 decision and proper forest management practices. He therefore recommended that

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<sup>21</sup> A "plot cruise" is a method of obtaining forest inventory by establishing small but representative sample plots throughout the forest.

<sup>22</sup> Cutting Budget for the Second Cutting Cycle, *supra* note 19, at p. 12.

<sup>23</sup> See note 14, *supra*.

"remedial legislation should be sought as promptly as possible." He stated with respect to the 20 MMBF harvest ceiling contained in the 1908 Act that:

This arbitrary limitation of the cut is not necessarily sound from the viewpoint either of good business or of proper technical management of the Forest. We believe, therefore, that legislation should be enacted to modify this limitation of the cut.

However, the record does not indicate that any form of remedial legislation was sought for either of the problems raised in his December 1950 memorandum.

Because of the difficulties involved in managing the forest without current and comprehensive inventory data, and because of concern over the 1950 decision and the stringent 20 MMBF harvest limitation, the Menominee foresters in January 1951 conducted a forest management conference at the reservation to help [12] them "re-evaluate the whole forest management plan and reset [their] course."<sup>24</sup> The conference was attended by several leading Government foresters and representatives of the Bureau of Indian Affairs. Participants agreed that 225 additional sample plots should be set up to establish a basis for a "Continuous Forest Inventory" (CFI) of the entire forest. They also agreed that the 10 percent cruise information, some of which dated back to 1914, had only "historical value" and could not be relied upon in planning future harvests.<sup>25</sup>

The forest managers also discussed the possibility of obtaining aerial photos of the Menominee Forest to provide up-to-date and comprehensive inventory data. All of the conference participants agreed that aerial surveys

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<sup>24</sup> Transcript of Menominee Forest Management Conference, January 23-25, 1951, at p. 6.

<sup>25</sup> Summary of Discussion at Menominee Forest Management Conference, January 23-25, 1951.



would be very useful, fast, and relatively inexpensive. They were informed that other Indian and national forests in the Lakes States area had already and successfully initiated aerial survey techniques.<sup>26</sup> The conference concluded with the statement that aerial photos should be obtained "as determined to be necessary [13] and desirable by the Forest Supervisor."<sup>27</sup>

Another major topic of discussion at the conference was the effect of the 20 MMBF annual harvest limitation on sound management practices. All of the participants recognized the undue restrictions placed upon management by this rigid limitation. During the discussion Mr. Gevorkiantz stated:

I can't see a figure like twenty million. Can't you remove that limitation on twenty million feet per year? If it is twenty million or die, where does the management come in? You can't start out with what it ought to be.<sup>[28]</sup>

*B. Period After July 10, 1951 Until April 1961,  
(Period in Dispute)*

The results of the first complete measurement of the CFI plot cruise system were issued in a report prepared by Mr. Winner, then forest supervisor, on January 1, 1952.<sup>29</sup> This inventory indicated a total Menominee Forest volume of 1224 MMBF, as compared to the 849 MMBF figure in 1914. Mr. Winner reported that, based

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<sup>26</sup> T. M. Holt of the Indian Service Area Office described in detail to conference participants that an aerial survey of the Red Lake Forest in Minnesota had been completed during the past year, at a cost of about \$7000. Transcript of Conference, at pp. 18-20.

<sup>27</sup> Summary of Survey and Management Conference, at p. 7.

<sup>28</sup> *Id.* at p. 88.

<sup>29</sup> Total Area-Plot Cruise, a Stand Structure Analysis of the Menominee Forest, dated January 1, 1952 (hereinafter "1952 inventory").

on this inventory data, an allowable annual cut of at least 22.4 MMBF could be sustained over a 15-year cutting cycle. However, since such a cut would exceed the statutory harvest limitation, Mr. Winner felt constrained to establish [14] four "cutting priorities" and to harvest only the highest priority trees.<sup>30</sup> He calculated that only "priority 1" and some portion of "priority 2" trees could be harvested under the statutory limitation. Mr. Winner was concerned, however, with the prospect of leaving the remainder unharvested, and he stated in his report: "It is this volume of priority 2 that remains behind from which one might expect to suffer the majority of mortality loss."

"Mortality loss" refers to the amount of dead timber that is so diseased or decayed as to be unmerchantable. The problem of "mortality loss" was explained in a report prepared by plaintiffs' expert, as follows:

The reduction of natural mortality loss is one of the most important tasks of management because it represents volume and value usually lost forever. The obvious way to control it is to cut out old growth timber and utilize it *before* it has a chance to lose its value, and at the same time provide growing space for young, vigorous timber. [Emphasis in original.] <sup>[31]</sup>

Mr. Winner also stated that the 1952 inventory was "but a preliminary step toward development of a com-

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<sup>30</sup> The four cutting priorities are set forth below:

1. All trees of greatest risk, regardless of vigor;
2. All trees of lowest vigor, medium and good risk;
3. All trees of medium risk, medium and good vigor;
4. All trees of least risk, medium and good vigor.

<sup>31</sup> George B. Banzhaf & Co., *A Report on Damages Suffered by the Menominee as a Result of the Mismanagement of the Menominee Forest by the United States for the Period Commencing July 10, 1951*, Vol. II (1971), (hereinafter "Banzhaf Report"), at pp. 19-20.

plete management [15] plan," and that other data would be required before a comprehensive plan could be established. One of the most important forest management tools still missing was a "condition class map," which would give an accurate indication of total timber density and size, as well as type, throughout the forest. A condition class map was not, however, constructed until 1957 after completion in that year of an aerial survey of the forest.

In 1954 Mr. Winner published a forest management plan based on the 1952 inventory.<sup>32</sup> Noting the large apparent increase in forest volume which had developed between 1914 and 1952, Mr. Winner stated that the current data "would indicate an allowable cut of 25,128,000 B.F." Mr. Winner's calculations also showed an increase in land area available for sawlog harvest from 39 percent to 56 percent, and a decrease in nonmerchantable area from 41 percent to 19 percent.

The 1954 Plan also contains disparaging comments about the statutory harvest limitation. Mr. Winner notes therein that the 20 MMBF annual limitation had been unchanged in *64 years*, despite significant increases in forest volume as shown by his own data. Because of the harvest limitation, however, he was obliged to carry over the "cutting priorities" from the 1952 inventory analysis. [16] The 1954 Plan is the first indication that defendant's foresters were concerned with overstocking in the forest.<sup>33</sup> The plan shows total trees (of all diameter classes) in a density of 63.65 trees per acre, compared to a "suggested normal" total of 29.8 trees per acre. The same chart shows a total Menominee Forest volume of

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<sup>32</sup> A Plan for Continuous Forest Control on the Menominee Indian Reservation, (hereinafter "1954 Plan").

<sup>33</sup> Overstocking results when growing timber stock has not been properly managed. It usually results in a "stagnation of growth and in an increase of natural mortality resulting in the loss of valuable timber." (Banzhaf Report at p. 14).

9360.5 BF/acre as compared with a "suggested normal" of 4188.3 BF/acre.<sup>34</sup>

By the spring of 1956 the first complete remeasurement of the CFI plot system was added to previous inventory data. In a memorandum dated March 2, 1956, Mr. Winner calculated the minimum allowable harvest based on this data to be 23.7 MMBF annually. He arrived at that figure after what he called "a rather complicated series of rationalizations, all of them in the direction of conservatism," which substantially discounted [17] the actual data.<sup>35</sup> Without these reductions, the indicated allowable harvest would have exceeded 36 MMBF annually.

Later that year Congress passed the earlier mentioned 2 MMBF increase in the annual harvest restriction, a relatively useless form of relief because it was limited exclusively to forest byproducts.<sup>36</sup> Mr. Winner testified at trial that he believed more of an increase was justified

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<sup>34</sup> 1954 Plan at L. The values for "suggested normal" number of trees and volume were adopted from Eyre and Zillgitt, *Partial Cuttings in Northern Hardwoods of the Lake States: Twenty-Year Experimental Results* (1950). The Eyre and Zillgitt study is referred to in defendant's expert's study as "the 'bible' on hardwood management in the Lakes States \* \* \*." Real Estate Research Corp., *Analysis and Appraisal Forest Lands, Menominee County, Wisconsin* (1971), at p. 83. Nevertheless, Mr. Winner warns in the 1954 Plan that since it is "an interim guide developed in one locality," the study must be used with caution. He also notes that the Menominee Forest is, on the average, "a much denser stand with a substantial volume of large trees." 1954 Plan at K.

<sup>35</sup> The reductions were as follows:

- a. 21.4 percent reduction for inventory statistical error;
- b. 10 percent reduction because acreage is not measured area;
- c. 9 percent reduction for possibility of plot volume error;
- d. 20 percent reduction for establishment of "forest contingency fund."

<sup>36</sup> See note 18, *supra*.

at that time and that the increase should have been available not only for byproducts but for the far more valuable sawlog production as well. He acknowledged, however, that his view "was not pushed in the request for for the legislation."

As previously noted, aerial photographs of the forest had been urged as early as January 1951, during the earlier described forest management conference. Foresters at the conference unanimously favored this efficient and inexpensive means of obtaining comprehensive inventory information, and they were reliably informed that it had been successfully used in nearby national [18] forests as early as 1947. However, the record reflects no effort to obtain aerial photographs of the forest until 1955. Final interpretations of the Menominee photographs were then not available until 1957.

The record does not indicate that the Menominee foresters were hampered in any way by the tribe in their efforts to obtain aerial photographs or any other type of useful inventory data. One of the Menominee foresters stated at the 1951 conference that:

The tribe was continually asking for [the total forest volume] figure and no doubt had good reason to ask. \* \* \* They would have been willing, I believe anxious in fact, in some years to have allotted enough money to have completed a cruise of the reservation to find out how much timber they had.<sup>[37]</sup>

Mr. Winner authored a new forest management plan in 1961 in preparation for termination of federal supervision and protection. The 1961 Plan had the benefit not only of two complete measurements of the CFI (1952 and 1956), but also aerial photographs that had been finally interpreted in 1957. The 1961 Plan set the allowable

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<sup>37</sup> Transcript of Menominee Forest Management Conference, note 24, *supra*, at pp. 29-31.

annual harvest at 30.3 MMBF. Although the net sawlog annual growth rate for 1953-1960 was estimated in the 1961 Plan at 2.19 percent, the new harvest limitation did not include any allowance for annual growth. It stated:

[19] This figure is simply the volume of cutting priority plus volume of overstocking divided by 15 years, and it should be obvious therefore that while cutting takes place, growth is also taking place. The volume of growth accrual, partially offset by present levels of mortality loss, can have no more serious effect than to delay accomplishment of stand adjustment to perhaps 16 rather than 15 years.<sup>[38]</sup>

Another aspect of the 1961 Plan is that it divided harvest areas into rigid compartments, ignoring the fact that some areas would be more heavily stocked than others. Because additional harvest of some compartments could not be used to offset lower harvests in others, the actual harvest fell far below the official overall allowable level. Thus, the annual harvest from 1961-1971 averaged only 27.2 MMBF, rather than 30.3 MMBF.<sup>39</sup>

The plan also contains detailed stock and stand tables for major species, and compares them with "suggested normal" values set forth in the Eyre and Zillgitt study.<sup>40</sup> For example, hardwood types were found to have a basal area of 82.3 square feet per acre (trees 9 inches and up) on 53,327 acres.<sup>41</sup> The Eyre and Zillgitt study had suggested that the normal basal area for [20] hardwood

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<sup>38</sup> A Plan for Continuous Control of Menominee Enterprises Incorporated Lands, (1961) at p. 48.

<sup>39</sup> Trial testimony of Wesley Rickard, Tr. p. 445. See also testimony of Richard Winslow, Tr. p. 191, to the same effect.

<sup>40</sup> See note 34, *supra*.

<sup>41</sup> "Basal area" is defined as "the cross-sectional area of the tree at 4.5 feet above the ground." Banzhaf Report, *supra*, note 31 at p. 13, n. 21. It is used as a measure of forest stocking levels.



types (which Mr. Winner "converted to Menominee conditions by application of localized volume tables,") was 73.0 square feet per acre. Mr. Winner observed that at these stocking levels:

There is little question concerning the immediate need for reducing stocking levels in these condition classes. Removal of high priority and overstocking should materially reduce the amount of mortality loss even at recommended stocking level.

Hemlock stock and stand tables indicated a basal area of 105.0 square feet, compared with a recommended 90.0 square feet in the 1961 Plan.<sup>42</sup> Because of its completeness, plaintiffs rely heavily on the data contained in the 1961 Plan (backdated to 1952 in some instances), as well as the recommended stocking levels, to calculate damages to the tribe resulting from mismanagement.

The 1961 Plan also frequently notes the adverse effects of the 20 MMBF statutory harvest restriction. Mr. Winner states therein that because of the limitation it has been—

physically impossible to adjust levels of growing stock, to harvest all priority material, and to complete the cycle within the allotted time.

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\* \* \* At this level of harvest, \* \* \* there remains, and for several cycles would continue [21] to remain, a substantial amount of overstocking in stands classed as large sawtimber and good density (indeed the bulk of the sawlog area). This is not a condition conducive to either maximum growth rates or minimum tree mortality.

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<sup>42</sup> However, pine (a less valuable species) indicated an average understocking condition, with a total basal area of 91.7 square feet, compared with a recommended 130.0.

### III. ANALYSIS OF DEFENDANT'S MANAGEMENT

#### A. *Reports Offered on Behalf of Plaintiffs*

Both parties rely heavily on extensive studies by expert witnesses to attack or support defendant's forest management practices. Plaintiffs' report on liability and damages was produced by its experts with George Banzhaf & Co.<sup>43</sup> Both George Banzhaf, president of the company, and his son, William H. Banzhaf, testified at trial. Messrs. Wesley Rickard and Richard C. Winslow also testified on plaintiffs' behalf. The qualifications of these experts have been fully set forth in a prior opinion in this case, and need not be repeated here.<sup>44</sup> Suffice it to note here, as in the prior opinion, that plaintiffs' experts "were all exceptionally well qualified by education and experience."<sup>45</sup>

The Banzhaf Report concludes that mismanagement occurred in each of five areas investigated, as follows:

- [22] 1. The 20 MMBF limitation on annual harvest;
2. Overstocking of the Menominee Forest;
3. The disproportionately high level of hemlock harvest;
4. The low level of pulpwood harvest;
5. The possibility of increased harvest of valuable veneer logs for sale on the open market, or for manufacture in a tribal veneer mill.

The areas investigated cannot be viewed as unrelated or as independent of one another. In fact, for the purpose of determining defendant's responsibility, all of the separate charges of mismanagement are essentially elements

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<sup>43</sup> Banzhaf Report, note 31, *supra*.

<sup>44</sup> Docket No. 134-67-A (Deed Restrictions), filed March 22, 1979, at pp. 13-15.

<sup>45</sup> *Id.* at p. 13.

of the "managerial straightjacket imposed by the 20 MMBF annual harvest limitation."<sup>46</sup>

The Government's forest supervisor, Mr. Winner, admitted in the 1961 Forest Management Plan that this archaic harvest restriction had made it "physically impossible" to correct the well recognized overstocking conditions prevailing in the Menominee Forest throughout the period here in dispute. A failure to reduce overstocking in a forest results in several types of losses. Dense, overstocked stands of timber cause increased mortality loss. Overstocking also results in reduced timber growth rates, as crowded trees cannot achieve their [23] maximum growth. Finally, a forest owner is deprived of the yearly revenue which can be earned from gradual reduction of an overstocking conditions.

Likewise, although the disproportionately large harvest of the less valuable hemlock species during the period in dispute may have been justified on silvicultural principles, it was detrimental to the maximum productivity of the forest, because the hemlock harvest displaced the harvest of more valuable species under the strictures of the annual 20 MMBF limitation.<sup>47</sup> The manager of the Menominee sawmill, Dickinson, reported that he tried in vain to convince forest manager Ridlington to reduce the hemlock cut, because of its adverse effects on mill profits. Without the annual harvest limitation, forest managers could have harvested hemlock as silviculturally necessary without simultaneously and unduly restricting harvest of the more profitable species.

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<sup>46</sup> Testimony of George Banzhaf, Tr. at pp. 156-57.

<sup>47</sup> Hemlock represented 27 percent of the total forest saw-timber volume in the 1952 inventory. However, cutting records for 1952-1960 show that 32.3 percent of the total volume harvested was hemlock (Banzhaf Report at p. 9). The average hemlock stumpage value was \$17, as compared with a \$27 average for all species excluding hemlock. (*Id.* at p. 11). The silvicultural justification for

The fourth conclusion in the Banzhaf Report to the effect that pulpwood was being systematically underharvested, is also another manifestation of the "straight-jacket" imposed by the harvest limitation. It is undisputed that the pulpwood harvest [24] is far less valuable than a corresponding harvest of sawlogs. Therefore, if the harvest ceiling would not allow adequate harvests of both sawlogs and pulpwood, the forest managers had no alternative other than to cut back on the pulpwood harvest, as they did, or to seek removal of the annual harvest ceiling, as plaintiffs claim they should have done, but failed to do.<sup>48</sup>

The final conclusion in the Banzhaf Report, relating to veneer production, is somewhat more complicated. Veneer is made from unusually large, straight and knot-free sawlogs. The average veneer log price during the period in dispute was four times higher than the average sawlog price. Yellow birch, generally the most valuable species in the forest, brought an average veneer stumpage price of \$170 per MBF over that 10-year period, as compared with its sawlog value of \$34. Veneer quality logs grow in relatively great abundance in the Menominee Forest. Because of their high value, defendant arguably should have increased veneer log production even within the existing harvest restriction. Plaintiffs allege that such an increase was possible either by selling veneer quality logs "on the stump" to private buyers, or by

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the large harvests of this relatively less valuable species is that hemlock is unusually susceptible to drought, blowdown, disease and insect attack. (*Id.* at p. 10).

<sup>48</sup> Defendant questions the availability of a market for pulpwood products. However, a national forest bordering the Menominee Forest sold over 23 MMBF of aspen pulpwood annually from 1955-1960, at an average price of over \$2 per cord. (P. Ex. B-24). Moreover, the 1951 annual Menominee Forest Report noted that a paper company 40 miles from the reservation "took all [the pulpwood] that we could deliver."

constructing a veneer-producing mill on the [25] Menominee Reservation.

The issue of the desirability of a veneer-producing mill is not properly before the court at this time. That issue is reserved for consideration under a later docket alleging mismanagement of the Menominee mills.<sup>50</sup> Putting aside the issue of possible construction of a veneer mill, the fact remains that only .7 percent of all log production was used for veneer during the period in dispute.<sup>51</sup> Mr. Winner was quoted in a 1959 letter as estimating that 4.2 MMBF of veneer could be expected from a total annual forest cut of 30 MMBF.<sup>52</sup>

There is ample evidence in the record that a market existed for the sale of veneer quality logs to nearby producers.<sup>53</sup> The low level of veneer production therefore appears to have been unwarranted even within the annual 20 MMBF harvest ceiling. Just as in the case of other elements in which defendant's management is questioned, it too was aggravated by the harvest ceiling.

#### *B. Report Offered on Behalf of Defendant*

Defendant's study of the Menominee Forest was conducted by [26] the Real Estate Research Corporation, and prepared by its vice-president, Stanley F. Miller.<sup>54</sup> The principal draftsmen of the sections of its Report relating to Timber Resources and Forest Management were Edward F. Steigerwaldt and Professor John Carow.

<sup>50</sup> Docket No. 134-67-C (Mill Mismanagement).

<sup>51</sup> Banzhaf Report at p. 38, Table IX.

<sup>52</sup> Letter to R. D. Holtz, Minneapolis Area Office, BIA, dated February 3, 1959.

<sup>53</sup> The Banzhaf Report states that there were 17 veneer mills within 50 miles of the Menominee Reservation. (Report at p. 48). The fact that such a mill was strongly considered for the reservation itself, also supports the existence of a market for veneer.

<sup>54</sup> See note 34, *supra*.

Messrs. Stanley F. Miller and Normal E. Briesemeister also testified on behalf of defendant. An evaluation of the qualification of these experts is set forth in a prior opinion in this case.<sup>55</sup>

On the basis of a comparison between the data obtained by aerial photographs taken in 1955 and in 1961, defendant's report concludes that "[t]he period of 1951-1961 saw no large or significant change in cover that would indicate 'mismanagement' of the forest resource." The report supports defendant's "conservative" management techniques, relying on the mandate in the 1950 *Menominee* decision "to preserve the forest for the Indians,"<sup>56</sup> so that the foresters were "determined to use every safeguard to prevent destruction of that resource."

Defendant's report also contains a comparison of Menominee Forest management techniques with those employed in other nearby forests. The report states of the four national forests [27] compared that they "all paralleled the problems of the Menominees in that they also depended entirely on the aerial photo mapping program before they could prepare a good forest management plan." The dates given, however, demonstrate that the Menominee managers lagged several years behind the managers of the cited national forests in initiating aerial surveys. In one of these national forests the survey began as early as 1947, and the latest began in 1953.

#### IV. DISCUSSION OF LIABILITY

The principal thrust of plaintiffs' reports and of the testimony of their experts is that the harvest income from the Menominee Forest was substantially below its potential during the period in dispute, primarily because of the unreasonably low annual harvest limitation. It is

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<sup>55</sup> Docket No. 134-67-A (Deed Restrictions), filed March 22, 1979, at p. 15, and finding of fact 48.

<sup>56</sup> See text accompanying notes 14 and 23, *supra*.



further urged that defendant knew or should have known by 1952 that conditions in the forest warranted much higher annual harvests. Defendant was therefore obliged as a trustee to seek amendment of the statutory harvest limitation from the Congress, which could not be aware of such changing conditions unless informed by management personnel. Finally, if essential inventory data was unavailable or insufficient to justify an appropriate recommendation to Congress amending the harvest limitation, then "a crash program [28] was in order to make that data available."<sup>57</sup>

In its 1950 *Menominee* decision<sup>58</sup> the court prescribed the management standards that were to govern defendant's supervision and control of the Menominee Forest. The court found that defendant's agents had failed to protect portions of the forest from overcutting, thereby failing to fulfill their responsibility as "guardian and trustee" of the forest to conduct the management of the forest as they would have "conducted their own businesses or private affairs."<sup>59</sup> Furthermore, by following its *then* current management practices, defendant had failed to exercise the "good faith, diligence, care and prudence" required of it as trustee. By its failure to manage the forest as a "commercial or industrial enterprise," defendant had not fulfilled the applicable fiduciary standards.

It is concluded that these same fiduciary standards, clearly enunciated in that 1950 decision, continued to apply to defendant's management of the forest in the period that followed.<sup>60</sup> [29] Plaintiffs' expert witnesses

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<sup>57</sup> As typified by the trial testimony of Dr. Duncan Harkin, Tr. at p. 681.

<sup>58</sup> 117 Ct. Cl. 442, 91 F.Supp. 917 (1950).

<sup>59</sup> *Id.* at 508.

<sup>60</sup> This case is being considered under a general jurisdictional statute. See note 3, *supra*. Nevertheless, the court has held that

examined defendant's management of the forest, measured against those fiduciary standards. They concluded that defendant's management fell far below the standards required. Defendant's conduct was not found to constitute mismanagement merely because it resulted in something less than optimum productivity from the forest. It was found, rather, to have even fallen far below what would be regarded as the minimum standards.<sup>61</sup>

The record does not disclose why Congress chose a harvest limitation of 20 MMBF back in 1890. The discussion at the Menominee Forest Management Conference in January 1951, however demonstrates unambiguously that whatever value the limitation might have had back then, it bore no relationship to actual [30] Menominee Forest conditions in the 1950's. The Menominee foresters had no idea in the 1950's whether that quite ancient

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"the new legislation [28 U.S.C. § 1505] did not discharge or cancel any fiduciary obligation of the United States." *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490 (1966).

<sup>61</sup> For example, Mr. Winslow testified (Tr. at p. 320) that the realistic income upon which the Banzhafs based their computation of loss by reason of overstocking—

"refers to the minimum, the minimum level that should have been undertaken in 1952 to face the problem of overstocking on the Menominee Forest. It is conservative in every aspect, and in no way reflects the maximum return that the property could have returned. \* \* \* What we did is we placed that level at what we felt was the minimum level acceptable and any level less than that we felt constituted mismanagement."

Mr. Rickard similarly testified that:

"I adopted a standard for evaluating management based on the idea of what a prudent and reasonable manager would do, and in deciding whether or not this forest was mismanaged, I compared what was done in terms of productivity and profitability with an average level of profitability that should reasonably have been expected to be achieved. \* \* \* I didn't decide it [the forest] had been mismanaged until it fell below what I would consider an absolute minimum of profitability. And it does fall below that minimum." (Tr. at pp. 426-27).

limitation would result in overcutting or undercutting of the forest.

Even before the 1951 management conference, Menominee foresters realized that this was an "arbitrary limitation," at odds with "good business" and "proper technical management" of the forest. They also realized that, regardless of its effect on overall management, harvest of some difficult species (specifically aspen) should have been exempt from the limitation in any event. Yet these serious doubts as to the efficacy of the harvest limitation were never communicated to Congress, and certainly not in the form of an effective request for amendment of the harvest limitation. Finally, only a very limited increase was sought and obtained in 1956.

It is significant that throughout the history of the Menominee Reservation, whenever the Menominee foresters actually requested amendments or waivers of the harvest limitation, Congress in every case reacted favorably to their recommendations. On several occasions, Congress temporarily waived or increased the limitation due to extraordinary forest conditions.<sup>62</sup> In 1956 Congress enacted a modest 2 MMBF increase when sought by [31] defendant's agents. There is no indication in the record that Congress was opposed at that time to the larger increase then thought necessary by Mr. Winner. It just "was not pushed in the request for the legislation."<sup>63</sup> Nor is there any indication that the Congress would have opposed requests for amendment at any time prior to or following that 1956 increase. The core of the problem was not inaction by the Congress, but rather the failure of defendant's agents, as those directly responsible, to supply the Congress with the information and recommendations necessary to insure prudent management of plaintiffs' assets under the applicable fiduciary standards,

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<sup>62</sup> See note 17, *supra*.

<sup>63</sup> Tr. at p. 538.

for example, as one would manage a "commercial or industrial enterprise."

To support its position, defendant cites *Mason v. United State*.<sup>64</sup> But that case is inapposite. *Mason* simply held that an executive department does not breach its fiduciary duty to its wards by failing to seek reversal of a dated Supreme Court decision adverse to the wards, which appeared likely to be overruled. Defendant's duty here was not to challenge Congress, but rather to inform and to seek approval from Congress (under whose general supervision it managed plaintiffs' assets) to proceed with the prudent management techniques necessary to harvest the Menominee Forest under current conditions. [32] Mr. Winner's efforts to adopt management of the forest to the stifling harvest limitation is graphically demonstrated by his need to set "cutting priorities" in the 1952 inventory and the 1954 Management Plan. By his own contemporaneous admission, the portion of priority 2 trees that could not be harvested within the limitation, was therefore subject to a severe threat of mortality loss.

Defendant also cites *Oneida Tribe v. United States*,<sup>65</sup> for the proposition that the United States cannot be held liable for the failure of Congress to enact remedial legislation. But here again, defendant misconceives plaintiffs' claim as one grounded on the failure of Congress to enact legislation. On the contrary, the claim is grounded on the failure of individuals, the Government's foresters, to recognize the need for amendment of the harvest limitation based on inventory and growth data readily available by 1952, and to inform Congress of this need, with appropriate recommendations which had previously been

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<sup>64</sup> 412 U.S. 391 (1973).

<sup>65</sup> 165 Ct. Cl. 487, 499 (1964). "Where the obligation of the United States is akin to that of a fiduciary, we would normally be slow to charge the defendant with a breach if the failure were a failure by Congress to enact new substantive legislation."

routinely followed. And if, as defendant strenuously argues, the 1952 inventory taken alone was not an adequate basis upon which to recommend amendments to Congress, then it was equally incumbent upon defendant as trustee of the Menominee Forest to obtain all [33] necessary data as expeditiously as possible.

Dr. Duncan Harkin, plaintiffs' rebuttal witness, was at the time he testified an Associate Professor of Agricultural Economics and Forestry at the University of Wisconsin, and Director of the Center for Natural Resources Policy Studies. He was also an extension specialist in the Natural Resources, Economics and Land Use Planning for the Cooperative State-Federal Extension Service. Dr. Harkin's interest in the Menominee Forest arose out of his doctoral thesis, which was an analysis of the 1961 Forest Management Plan and its effects on the Menominee Forest. He did not testify as a paid expert. All of his expenses were paid by the Federal Extension Service. Moreover, when Dr. Harkin completed his doctoral dissertation concerning the Menominee Reservation in 1966, this case had not yet been filed, and he had no idea that his thesis might be pertinent to litigation.<sup>66</sup> In his thesis, he concluded that the Menominee Forest was overstocked, and that it would remain so unless the 1961 Management Plan was radically amended.

Dr. Harkin also testified at trial that he believed the Government foresters had sufficient data in 1951 or 1952 to conclude that a harvest ceiling of 20 MMBF per year should be increased.<sup>67</sup> It was his testimony, moreover, that there were [34] ample means available to the foresters to obtain fact and reliable inventory information, for example, by use of aerial photographs or CFI measurements, as well as by the use of the more tradi-

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<sup>66</sup> Tr. at p. 676.

<sup>67</sup> Tr. at pp. 679-80.



tional strip or line plot cruises.<sup>68</sup> He agreed with plaintiffs' principal expert witnesses concerning the overall mismanagement of the forest, except that he found them to be somewhat "conservative."<sup>69</sup>

Defendant relies in its report on the argument that its foresters were determined to prevent the "destruction" of the Menominee Forest. But as we have seen, "destruction" can result from undercutting as well as from the overcutting which defendant leaned over backwards to avoid. In its 1950 *Menominee* decision<sup>70</sup> the court specifically stated:

Congress probably did not contemplate the maintenance of conditions on the Menominee Forest as they existed in 1908. From the legislative history referred to previously above, we believe that Congress hoped for a great improvement in the forest conditions on the reservation.<sup>[71]</sup>

By undertaking exclusive management of the Menominee Forest for a period which eventually extended to 107 years, defendant [35] as trustee was obligated to conduct its management operations so as to improve the quality of the forest in accordance with principles of sustained yield. That obligation has been repeatedly recognized by Congress and by this court. Plaintiffs do not allege, as defendant appears to suggest, that defendant had an obligation to strip or liquidate the forest. On the contrary, its obligation was to maintain the forest at a level reasonably related to its potential productivity under current management standards.<sup>72</sup>

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<sup>68</sup> Tr. at pp. 685-88.

<sup>70</sup> Note 58, *supra*.

<sup>71</sup> 117 Ct. Cl. at 507.

<sup>72</sup> For a discussion of the management standards employed in studies by plaintiffs' experts, see note 61, *supra*.



Government forester Winner's calculations, based on inventory and growth data from 1952 forward, were substantially adjusted downward to account for possible statistical error and in order to maintain a "forest contingency fund." That conservative approach was warranted. Congressional approval for larger harvests should not have been recklessly sought. But even the most conservative approach would not extend to a reluctance to seek an increase in the harvest limitation after Mr. Winner's conservatively developed data showed in 1952 an allowable cut of 22.4 MMBF, with a later amendment in the 1954 Management Plan to 25.1 MMBF. Nor does this cautious approach justify the failure to seek additional inventory data by aerial surveys as soon as the need therefor became obvious. The crucial importance [36] of this management tool had been recognized as early as 1948, and it had been a major topic of discussion at the Forest Management Conference in 1951. No justification has been offered for the failure to obtain and interpret aerial photos until 1957.

Several other possible methods of collecting the necessary inventory data were discussed at the 1951 Management Conference. Defendant was not committed to any one method of collecting data, nor was it hampered in its efforts by lack of technology or lack of support from the plaintiffs. Defendant's inordinate conservatism thereby grew into inertia and into a corresponding failure to manage the Menominee Forest as a "commercial or industrial enterprise."<sup>73</sup>

Defendant's comparison of the Menominee Forest with private commercial forests in Wisconsin and Michigan

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<sup>73</sup> As stated by a former Menominee mill manager, R. W. Dickinson, the failure to make necessary improvements in the management of the reservation is evidence of the "utter indifference" of the BIA. (Letter to George Banzhaf, October 13, 1971).

actually serves to confirm the unwarranted conservatism of the Menominee foresters. The Connor Land and Lumber Company of Wausau, Wisconsin, used cutting guidelines similar to those proposed in the Eyre and Zillgitt study, attempting thereby to leave a basal area after harvest of 50-60 square feet in trees 10 inches and over at diameter breast height. Similarly, another private forest in Wisconsin set a minimum basal area of 66 square feet per acre. But the corresponding figure in the Menominee Forest was 89.2 [37] square feet per acre.

It is concluded on the weight of the evidence that defendant mismanaged the Menominee Forest during the years 1951 through 1961. As detailed earlier, this conclusion is predicated on the failure of defendant's agents (based on the inventory data available by 1952) to seek congressional amendment of the harvest limitation. That was the year of the first CFI complete measurement, reported in the stand and structure analysis dated January 1, 1952. It indicated an allowable harvest of at least 22.4 MMBF'. Liability is also based on defendant's failure to obtain other necessary inventory and growth information known to be crucial to forest management, at least as early as the Menominee Forest Management Conference in January 1951. Most important, in this respect, is defendant's failure to obtain aerial photographs and the related condition class map of the forest until 1957.

Because defendant could not have been aware of actual conditions in the forest until after completion of the first CFI measurement, no liability is predicated on acts prior to publication of the stand and structure analysis on January 1, 1952. Accordingly, that date will serve as the starting point for measurement of liability and damages.

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## IV. MEASURE OF DAMAGES

*A. Period Prior to Termination (January 1, 1952-April 29, 1961)*

The Banzhaf study calculated damages by comparing the actual annual harvest between 1952 and 1960, with a constructed "realistic annual harvest."<sup>74</sup> No damages were assessed for 1951, because of the lack of inventory data until 1952, because of the unavoidable lag in implementing the recommendations of the January 1951 Forest Management Conference, and because of the complication of an extra hemlock harvest in 1951 due to blowdown and disease. The Banzhaf calculations thus correspond to the court's conclusion that liability should not be predicated on acts prior to January 1, 1952.

The Banzhaf method involves subtracting the actual harvest receipts from a "realistic annual harvest," as derived from growth and overstocking information contained in the 1952 inventory and the 1954 and 1961 Management Plans. Annual growth is found to be 2 percent. This figure is somewhat low, in that Mr. Winner (defendant's forester) reports the sawlog growth rate in his 1961 Management Plan to be 2.19 percent. The growth [39] rate is then multiplied by the total inventory per species, as derived from the 1954 Management Plan. It is then reduced in the Banzhaf study by the volume of trees less than 12 inches in diameter, and it is further reduced by 10 percent as a "safety factor," for a total harvestable annual growth of 21.1 MMBF.

Overstocking or "excess inventory" is calculated as the difference between the 1961 actual forest volume (reduced by 10 percent) and the volume recommended in the 1961 Management Plan, which was in turn adopted from the

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<sup>74</sup> Banzhaf's "realistic" harvest figures were not designed to reflect the maximum levels attainable, but rather "the minimum level acceptable and any level less than that we felt constituted mismanagement." (Testimony of Richard Winslow, Tr. p. 320).

Eyre and Zillgitt study. Distributed over a 45-year cutting cycle, the elimination of excess inventory serves to add 6.58 MMBF per year to the annual harvest. Thus, the total realistic harvest as determined by the Banzhaf study, is 27.7 MMBF per year.

This realistic annual harvest is then distributed by species, and multiplied by the stumpage values for each species. Stumpage values are those listed in defendant's annual forest reports which were calculated by the so-called "Delaney formula." That formula was used by the Menominee foresters to convert rough lumber prices back to stumpage values. Other elements contributing to a realistic annual harvest include 10,000 cords per year of aspen pulpwood, at an estimated market price of \$2 per cord, and 2 MMBF of veneer logs at the weighted average veneer stumpage rate, for each of the 9 years in dispute. The total [40] realistic harvest minus actual harvest receipts, amounts to \$3,571,225 as damages resulting from mismanagement.

Plaintiffs' expert Wesley Rickard made an independent calculation of damages. Employing basically the same technique as the Banzhaf study, Mr. Rickard arrives at a total damage figure of \$5,886,460. The disparity is due to several factors. Firstly, unlike the Banzhaf study, Mr. Rickard does not reduce the 1952 inventory by a 10 percent "safety factor," nor does he omit trees smaller than 12 inches. This results in higher annual growth available for harvest (23.6 MMBF rather than 21.1 MMBF as found by Banzhaf). Secondly, Mr. Rickard's annual harvest of excess inventory is also higher than the corresponding Banzhaf figure because Rickard posits the elimination of overstocking in one 15-year cutting cycle in contrast to the Banzhafs use of three 15-year cycles to accomplish removal of overstocking.

Thirdly, Mr. Rickard uses an average stumpage value of \$39.31, as compared with \$31.54 under the Delaney formula accepted by the Banzhafs. He testified that he

believed the Delaney formula serves to underestimate actual stumpage value.<sup>75</sup> Therefore, he reversed the Delaney formula calculations and subtracted estimated administrative, milling and logging costs from the resultant rough lumber prices. This is the same method employed in his appraisal of the Menominee Forest as required in [41] connection with the prior Deed Restriction claim.<sup>76</sup> Mr. Rickard testified that the difference between the Delaney formula stumpage values, and his "full utilization values" was due primarily to the fact that little of the annual sawlog harvest was directed to veneer production.<sup>77</sup>

Finally, Mr. Rickard's calculation of damages is for the period from July 1951 through April 1961, or 9.83 years. This period is longer by 5 months than the one employed by the Banzhafs. The shorter period beginning January 1, 1952, has been adopted by the court because it more accurately fixes the date when defendant's mismanagement of the Menominee Forest could reasonably be said to have begun.

Of the total potential harvest of 31.2 MMBF (23.6 MMBF annual growth plus 7.6 excess inventory) found by Mr. Rickard, 11.3 MMBF were unharvested, and the loss is measured by multiplying this amount by the full utilization value of \$39.31. In addition, the actual annual harvest of 19.9 MMBF is multiplied by \$7.77, the value by which he found the timber was underutilized. By subtracting actual harvest receipts, he computes a total loss of \$598,826, and over the full 9.83-year period, a loss of \$5,886,460.

Both of the expert damage assessments are reasonably constructed. They are basically similar in approach and on [42] many points they reach the same results by in-

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<sup>75</sup> Tr. pp. 433-34.

<sup>76</sup> No. 134-67-A, at p. 21.

<sup>77</sup> Tr. at p. 438.



dependent means.<sup>78</sup> The calculations do, however, diverge at several important points, with the differing results above cited. The Banzhaf study is more detailed and specific, usually providing a breakdown of calculations by species. This provides a greater assurance of accuracy, and insures that the damages computed are related to actual conditions in the Menominee Forest.

On the other hand, the Banzhaf approach is unduly conservative. There is no evidence that trees under 12 inches in diameter were unmerchantable. Likewise, there is no justification for reduction of the 1952 inventory figure by 10 percent. Any statistical error could with equal probability add 10 percent to the inventory figure calculated. Furthermore, Mr. Rickard's method of calculating stumpage values has been found in a prior opinion to be more accurate than the "Delaney" formula, and it is also supported by the testimony of Dr. Harkin.<sup>79</sup> Finally, the 15-year cutting period suggested by Mr. Rickard to accomplish reduction of overstocking is more realistic than the 45-year period used by Banzhaf. A 15-year period was actually adopted in the 1961 Management Plan. It is concluded that the most accurate and reasonable figure for total damages, and the one [43] hereby adopted, is the average of the Banzhaf and Rickard totals, or \$4,728,842.

### *B. The Overcompensation Issue*

Defendant argues that the award to plaintiffs of the full difference between potential and actual harvests results in substantial overcompensation because the trees that were left uncut by defendant's inordinately low harvest remained in the forest inventory and were turned

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<sup>78</sup> For example, the Banzhaf study uses a growth estimate of 2 percent annually, while Mr. Rickard independently reaches a figure of 1.93 percent.

<sup>79</sup> See Docket No. 134-67-A (Deed Restrictions) at p. 23, n.29.



over the plaintiffs upon termination of federal supervision and protection in 1961. Defendant computes the value of the uncut timber at \$2,056,713. This amount is the difference between the realistic and actual harvest levels (66.8 MMBF), multiplied by 1961 stumpage prices.

Defendant's argument would have merit only if the subject matter of this claim were a nonperishable resource. However, the nature of a forest is such that unharvested trees do not remain indefinitely in a forest inventory. Unharvested trees are subject to what the foresters call "mortality loss." In addition, increasingly overstocked conditions tend to reduce overall growth rates of all species throughout the forest.

This issue was pursued to some extent at trial. Plaintiffs' witnesses, Messrs. Winslow and Banzhaf, testified that many of the unharvested trees would be unavailable for future harvest because of mortality loss, and further that growth rates in the [44] Menominee Forest would be substantially impaired.<sup>80</sup> Defendant's forest management plans also contain several references evidencing a recognition of these same problems.

Neither party has attempted to quantify the magnitude of mortality loss or reduced growth rates resulting from overstocking. However, Mr. Winner notes in the 1961 plan that lost mortality in hardwood types in the current overstocked condition is approximately 60 BF/acre/year, as opposed to approximately 20 BF/acre/year at the "recommended optimum."<sup>81</sup> The estimated mortality loss was found to be about equal for pine and even higher for hemlock.<sup>82</sup> Assuming this figure to be reasonably accurate for the other types as well, the annual excess mortality loss due to overstocking on a total of

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<sup>80</sup> Mr. Winslow, Tr. at p. 324; Mr. Banzhaf, Tr. at pp. 157-58.

<sup>81</sup> 1961 Management Plan at p. 21.

<sup>82</sup> Namely, 65 BF/acre/year.

131,000 sawtimber acres would be about 5.24 MMBF per year. Over the 9.33-year period under consideration, this amounts to 48.9 MMBF. Therefore, excessive mortality loss alone accounts for 73 percent of defendant's claimed offset of 66.8 MMBF for overstocked and unharvested timber.

No similar data are available to compute the extent to which growth rates in the forest suffered by reason of overstocking, and this additional loss cannot therefore be measured with [45] precision. On the basis of available data, however, the court concludes that a total of 20 percent of the unharvested potential harvest was still present and harvestable upon termination of federal supervision and protection. Plaintiffs' damages are therefore reduced by 20 percent of defendant's total estimate of uncut timber available at termination, or \$411,342.

### *C. Other Damages Preceding Termination*

Both Mr. Rickard and the Banzhafs add 5 percent annually to the total damages, representing "the use of the Menominee could have made of the losses they incurred."<sup>83</sup> Mr. Rickard also includes an alternative calculation of this additional loss at 10 percent per annum. Defendant objects to this calculation, characterizing it as "an improper claim for compound interest."

It is beyond dispute that plaintiffs are not entitled to interest on damages incurred by reason of defendant's breach of trust. Recovery of interest is permissible in the case of a fifth amendment taking, and in certain other instances where payment of interest has been expressly authorized by statute, treaty or contract.<sup>84</sup> Waiver of the Government's immunity from liability for

<sup>83</sup> Banzhaf Report, *supra*, note 31 at p. 60.

<sup>84</sup> *Peoria Tribe of Indians v. United States*, 177 Ct. Cl. 762, 766-68, 369 F.2d 1001 (1966).

interest "must be affirmative, clear-cut, and unambiguous." <sup>85</sup> There has been no waiver in this instance.

[46] Although phrased as loss of use of the damages claimed, this additional claim is clearly one for interest and it is therefore disallowed.<sup>86</sup>

*D. Damages Claimed for the Post-Termination Period (April 30, 1961-December 1, 1971)*

Mr. Rickard has also calculated damages suffered by the plaintiffs during the decade following termination of federal supervision and protection. The claim is based on the ripple effect of mismanagement prior to termination, with consequent impact during the post-termination period. Specifically, plaintiffs cite defendant's "inadequate" 1961 Management Plan, and defendant's failure to deliver a "well-regulated" Menominee Forest to plaintiffs at termination.

Defendant responds that plaintiffs' claims for post-termination damages is barred by a 1956 amendment <sup>87</sup> to the Menominee Termination Act, which provides that:

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<sup>85</sup> *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 90 (1947).

<sup>86</sup> See *United States v. Mescalero Apache Tribe*, 207 Ct. Cl. 369, 388-89, 518 F.2d 1309 (1975).

"\* \* \* the same no-interest rule applies to any incremental damages sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect.

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It may be seen from the foregoing decisions that the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it."

<sup>87</sup> Act of July 14, 1956, 70 Stat. 549 (the so-called "Reuss amendment").

[47] The sustained yield requirement contained in this act shall not be construed by any court to impose a financial liability on the United States.

The short answer to this is that the damages claimed for the post-termination period are not predicated upon the sustained yield requirement in the Termination Act. Although the Termination Act may immunize the general requirement to exercise "sustained yield" management, it cannot protect defendant's forest management plan if that plan fails to measure up to the proper and prudent sustained yield standards by failing to take into account the overstocking conditions prevailing at that time.

It has already been determined, both in the 1950 *Menominee* decision<sup>88</sup> and earlier in this opinion, that defendant's trust obligations to manage the Menominee Forest in accordance with principles of sustained yield, may be violated by undercutting (as well as overcutting) by reason of defective management planning. Defendant's 1961 Management Plan was actually drafted prior to termination, by the same unduly conservative standards which had infected the earlier management plans which had resulted in gross overstocking. Forest inventory and growth data upon which the 1961 Management Plan was based, were all collected prior to termination. Moreover, the 1961 plan itself was so inflexible that even the official annual harvest prescribed [48] therein could not be maintained.<sup>89</sup>

It is concluded that the 1961 Management Plan was not consistent with prudent sustained yield management. As in the case of defendant's management prior to termination, the 1961 plan failed to exhibit the "good faith, diligence, care and prudence" required under the fiduciary standards to be applied in this case. Moreover, the

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<sup>88</sup> Notes 14 and 23, *supra*.

<sup>89</sup> See note 38, *supra*, and accompanying text.

damage to the Menominee Forest caused by defendant's earlier mismanagement could not be corrected overnight following termination of federal supervision, control and protection. The 1961 Management Plan perpetuated the defective policy responsible for plaintiffs' loss prior to termination, and it caused continuation of those losses following termination.

Mr. Rickard based his damage calculations for the period following termination on data contained in the 1961 Management Plan. The 1961 plan indicates a total annual growth available for harvest of 28.7 MMBF. Mr. Rickard then subtracts understocked pine growth (5.6 MMBF), and adds excess inventory of hardwood and hemlock (8.1 MMBF) and "priority trees" (4.3 MMBF).<sup>90</sup> He thus computes a potential annual cut of 35.5 MMBF.

Stumpage values averaged \$34.10 per MBF, based on open market stumpage values obtained from the chief forester of [49] Menominee Enterprises, Inc., and reduced by capital gains taxes.<sup>91</sup> Total annual loss for the 10-year period following termination therefore amounts to \$2,878,415. Mr. Rickard's additional 10 percent per annum on this amount, called a "reasonable expectation of productivity from these funds," is rejected as it was in the computation of damages incurred in the period prior to termination.

Defendant does not dispute these figures, relying solely on the defense of the Reuss amendment.<sup>92</sup> Nor does the Banzhaf Report address this issue. Based on the similarity between Mr. Rickard's method of computing dam-

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<sup>90</sup> Rickard Tables B-1, B-2. A "priority tree" is defined as one subject to high risk of mortality loss if not immediately harvested. Tr. p. 443.

<sup>91</sup> Tr. at p. 447. The tribe became subject to state and federal taxes following termination.

<sup>92</sup> See note 87, *supra*, and accompanying text.

ages both before and after termination, it is concluded that his computations are reasonable, and they are adopted.<sup>93</sup>

## VI. STATUTE OF LIMITATIONS ISSUE

This case was filed April 25, 1967. The applicable statute of limitations requires that a claim be filed "within six years [50] after such claim first accrues."<sup>94</sup> Defendant argues initially that a claim for all but the final few days (April 25-29, 1961) of the period prior to termination is barred by application of the 6-year limitation period. Plaintiffs reply that the statute is tolled because their lack of knowledge and lack of proper training rendered the injury suffered "inherently unknowable" when the initial liability-creating events occurred.<sup>95</sup>

Defendant then urges that even if the claims were unknowable during part of the decade in dispute, they became obvious with publication of the 1961 Management Plan, which contained all of the information necessary for plaintiffs to formulate their claims. The 1961 plan, defendant contends, was "available to all parties prior to April 26, 1961" thus maturing plaintiffs' claim outside the limitations period.

It is an established principle of trust law that the claim of a beneficiary does not accrue until the trust is terminated or repudiated by the trustee.<sup>96</sup> The principle

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<sup>93</sup> This is without prejudice to plaintiffs' asserted right to damages, if any, incurred after trial, subject to offset of the value, if any, of uncut timber still available for harvest during the corresponding period.

<sup>94</sup> 25 U.S.C. § 2501 (1976).

<sup>95</sup> Citing *Spevack v. United States*, 182 Ct. Cl. 884, 390 F.2d 977 (1968); *JAPWANCAP, Inc. v. United States*, 178 Ct. Cl. 630, 373 F.2d 356, cert. denied, 389 U.S. 971 (1967).

<sup>96</sup> *United States v. Taylor*, 104 U.S. 216 (1881); *Oldland v. Gray*, 179 F.2d 408 (10th Cir. 1950); *Russell v. United States*, 37 Ct. Cl. 113 (1902).



is designed to protect wards or beneficiaries who cannot be presumed to be as [51] knowledgeable as their trustees in business affairs, especially in those circumstances where the trustee may be in a position to hinder or prevent the beneficiaries from discovering the precise facts necessary to establish that they have been the victims of mismanagement. The principle has frequently been applied in trust cases involving Indian property.<sup>97</sup> Where an Indian trust is terminated by the United States, the termination date has been held to be the date on which a breach of trust claim accrues.<sup>98</sup>

Although the principle is not universally followed in Indian cases, there being an exception, for example, when the allegedly incompetent Indian is determined by the court to be capable of managing his own affairs,<sup>99</sup> it should properly be applied where, as here, the Indians were not skilled in the technical science of forestry and no efforts were made by defendant to prepare them adequately to take over management of their property.<sup>100</sup> Plaintiffs herein cannot be regarded as having had notice of their claim prior to termination of federal supervision, control, [52] and protection.<sup>101</sup>

Even if the 1961 Management Plan were assumed, *arguendo*, to have put plaintiffs on notice of their claim, it became effective only after federal termination. It does not bear the date of its approval by the Menominee council, plaintiffs apparently did not participate in its

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<sup>97</sup> See, e.g., *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238 (N.D. Cal. 1973).

<sup>98</sup> *Affiliated Ute Indians v. United States*, 199 Ct. Cl. 1004 (1972) and *Id.*, 215 Ct. Cl. 935 (1977).

<sup>99</sup> As in *Capoeman v. United States*, 194 Ct. Cl. 664, 440 F.2d 1002 (1971).

<sup>100</sup> See generally Basic Opinion, No. 134-67, note 1, *supra*.

<sup>101</sup> See and cf. *Spevack v. United States*, 182 Ct. Cl. 884, 390 F.2d 997 (1968).

preparation, and it cannot be assumed that they had access to it prior to that date. Even if they had such access, there is no evidence that this in and of itself would have made them aware of the prior forest mismanagement and of the consequences thereof. Plaintiffs' claim of forest mismanagement was timely filed on April 25, 1967.

## VII. THE FIFTH AMENDMENT TAKING ISSUE

Plaintiffs also claim in this case that the 20 MMBF harvest restriction, originally imposed in 1890, constituted an unreasonable and arbitrary limitation upon the use of their land during the period here in dispute. As such, plaintiffs contend, it indicates the lack of a "good faith effort on the part of Congress to give the Indians the full value of their land," and therefore constitutes a taking under the fifth amendment.<sup>102</sup>

The argument is without merit on these facts. Plaintiffs' forest mismanagement claim is not directed to any failure of Congress, but rather to the acts and omissions of the Government's [53] Indian agents in failing to recognize the inadequacy of the harvest limitation, and therefore to seek its amendment in a timely manner.

In any event, while the acts of the Government have been shown to be so remiss as to constitute a breach of the high standard of conduct required of a fiduciary, the record does not support plaintiffs' claim that these acts indicate such a lack of good faith as to sustain an unconstitutional taking. An earlier opinion recognized an alternative claim of a taking of plaintiffs' property where it was predicated upon inclusion of restrictive provisions in the deed returning plaintiffs' property to them following termination.<sup>103</sup> The taking in that case was, how-

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<sup>102</sup> Citing *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 556-57 (1968).

<sup>103</sup> Docket No. 134-67-A (Deed Restrictions) at pp. 71-73.

ever, founded upon the failure of the United States as trustee adequately to protect the interests of the plaintiffs against "all the people of Wisconsin and this country" who benefited from the restrictive provisions at the expense of plaintiffs.<sup>104</sup>

There was not in this case a similar conflict of interest on the part of the defendant amounting to bad faith. Mismanagement of the Menominee Forest by defendant's agents caused this valuable forest asset to be underproductive, and this certainly [54] constituted a breach of the high standards governing the conduct of a trustee. But the mismanagement was not so gross and wanton as to imply bad faith. Plaintiffs' alternative characterization of this claim as a fifth amendment taking, is therefore, not favorably regarded.

### CONCLUSION

On the basis of the foregoing opinion, it is concluded that defendant breached its fiduciary duty to plaintiffs by reason of its management of the Menominee Forest during the period prior to termination extending from January 1, 1952 to April 29, 1961. Plaintiffs are entitled to recover four million, three hundred seventeen thousand, five hundred dollars (\$4,317,500) in damages for defendant's mismanagement prior to termination of federal supervision, protection, and control. It is further concluded that plaintiffs are entitled to two million, eight hundred seventy-eight thousand, four hundred fifteen dollars (\$2,878,415) for damages continuing into the post-termination period, as a result of mismanagement of the Menominee Forest prior to termination of federal supervision, protection, and control.

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<sup>104</sup> *Id.* at p. 70.

[55]

## FINDINGS OF FACT

## FOREST MISMANAGEMENT CLAIM

## I. GENERAL BACKGROUND

A. *Prior Decisions in Related Cases*

1. These findings support the third of a large and complex series of related claims for damages. A basic opinion, setting forth the general background and history of the Menominee Termination Act, the preexisting relationship between the parties, and the general legal consequences attendant upon termination of that relationship, was filed July 19, 1978 and designated Docket No. 134-67 (Basic). Defendant's monetary liability following termination for return of plaintiffs' forest property subject to restrictions on its use, conveyance and encumbrance, is treated with in opinion bearing Docket No. 134-67-A (Deed Restrictions) filed March 22, 1979.

2. The opinion in Docket No. 134-67 (Basic) did not relate to a claim for a money judgment and it was published mainly to provide historical background for the claims to follow. It was not published with the understanding that it would be reviewed independently of opinions to follow with specific claims for money judgments on their particular facts. However, defendant sought review of that "basic," or background, opinion and in a decision dated October 17, 1979, the court vacated the "basic" opinion and returned it to the trial division for further proceedings in conformity with its opinion. (*Menominee Tribe of Indians v. United States*, 221 Ct.Cl. —, 607 F.2d 1335 (1979).

In its opinion of October 17, 1979, the court described the types of claims for money judgment which it deems within its jurisdiction, namely:

- (a) claims said to arise under the Constitution; (b) claims that the Interior Department violated the Termination Act in the respects left open by the pre-

ceding discussion in this opinion; (c) claims that the Interior Department violated other statutes in its dealings with the Menominees; and (d) the specific claims set forth in note 2, *supra*, insofar as they do not rest on Congress's (or the [56] Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act. [Slip op. at p. 18.]

### B. Relevant Legislation

3. At the time of termination of federal supervision in 1961, the Menominee Reservation consisted of 233,902 acres of unallotted land along the upper Wolf River in northwestern Wisconsin. The land was for the most part aboriginally owned by the tribe, and was confirmed to the tribe by the Treaty of Wolf River, May 12, 1854, 10 Stat. 1064. From 1854 until termination of federal supervision the defendant held fee title to the Menominee Reservation, in trust for the benefit of the tribe, and it was solely responsible for management of the affairs and properties of the Menominees. (Docket No. 134-67 (Basic) at pp. 3-5.)

4. About 95 percent of the Menominee land is forest containing commercially valuable timber that has been, and is today, plaintiffs' chief source of income. Timber harvest in the forest was limited by Congress to 20 million board feet (hereinafter "MMBF") per year in the Act of June 12, 1890, 26 Stat. 146, and in the Act of March 28, 1908, 35 Stat. 51. In *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442 (1950), the court held that the 1908 Act imposed upon the Government a duty to manage the Menominee Forest on a "sustained yield" basis, that is, "with the object of leaving the forest in such a condition that a continuous or sustained yield of timber will result naturally." (117 Ct. Cl. at 496.)

5. The 108 Act provided as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled* That the Secretary of the Interior be, and he is hereby, authorized and directed, under such rules and regulations as he may prescribe in executing the intent and purposes of this Act, to cause to be cut and manufactured into lumber the dead and down timber, and such fully matured and ripened green timber as the forestry service shall designate, upon the Menominee Indian Reservation in the State of Wisconsin: *Provided*, That not more than twenty million feet of timber shall be cut in any one year: *And provided further*, that this limitation shall [57] not include the dead and down timber on the north half of township numbered twenty-nine, range numbered thirteen east; the north half of township numbered twenty-nine, range numbered fourteen east, and the south half of township numbered thirty, range numbered thirteen east, on the Menominee Reservation in Wisconsin.

\* \* \* \* \*

Sec. 2. That the Secretary of the Interior shall, as soon as practicable, cause to be built, equipped, and operated suitable sawmills, equipment and necessary buildings for manufacturing into lumber the timber cut under the provisions of this Act, and there shall be employed such skilled foresters, superintendents, foremen, cruisers, rangers, guards, loggers, scalers, and such other labor, both in the woods and for operating sawmills, equipment and necessary buildings as may be necessary in cutting and manufacturing logs and lumber and in the protection of the forests upon said Indian reservation. The Secretary of the Interior in so far as practicable shall at all times employ none but Indians upon said reservation in forest protection, logging, driving, sawing, and man-



ufacturing into lumber for the market such timber, and no contract for logging, driving, sawing timber, or conducting any lumber operations upon said reservations shall hereafter be let, sublet, or assigned to white men, nor shall any timber upon any such reservations be disposed of except under the provisions of this Act. Whenever any Indian or Indians shall enter into any contract pursuant to this Act, and shall seek by any agency, copartnership agreement, or otherwise to share in the same with any white man, or shall employ in its execution any labor or assistance other than the labor and assistance of Indians, such act or acts shall thereupon terminate such contract, and the same shall be annulled and canceled.

Sec. 3. That the lumber, lath, shingles, poles, posts, bolts, and pulp wood, and other marketable [58] materials so manufactured from the timber cut upon such reservations shall be sold to the highest and best bidder for cash, after due advertisement inviting proposals and bids, under such rules and regulations as the Secretary of the Interior may prescribe. The net proceeds of the sale of such lumber and other material shall be deposited in the Treasury of the United States to the credit of the tribe entitled to the same. Such proceeds shall bear interest at the rate of four per centum per annum, and the interest shall be used for the benefit of such Indians in such manner as the Secretary of the Interior shall prescribe.

Sec. 4. That the Secretary of the Interior is hereby authorized to pay, out of the funds of the tribe of Indians located upon said reservation, the necessary expenses of the lumber operations herein provided for, including the erection of sawmills, equipment and necessary buildings, logging camps, logging equipment, the building of roads, improvement

of streams, and all other necessary expenses, including those for the protection, preservation, and harvest of the forest upon such reservation.

Sec. 5. That when the dead and down timber, and such fully matured and ripened green timber as the forestry service shall designate, shall have been converted into lumber, then the Secretary of the Interior is directed to make sale of such portions of the saw-mill and manufacturing plant as will not, in his judgment, be needed for continuing operations on this reservation. The terms of these sales shall be fixed by the Secretary, and after the payment of the costs and charges of sale the net proceeds thereof shall be deposited in the same manner and for the same purposes as the net proceeds of the sale of the lumber aforesaid.

Sec. 6. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

6. In 1935, Congress passed a special jurisdictional statute to enable the Menominee Tribe to bring actions in the [59] Court of Claims, for, *inter alia*, forest mismanagement. The Act of September 3, 1935, 49 Stat. 1085, as amended by Act of April 8, 1938, 52 Stat. 208 provides in pertinent part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the Court of Claims to hear, determine, adjudicate, and render final judgment on all legal or equitable claims of whatsoever nature which the Menominee Tribe of Indians may have against the United States, arising under or growing out of any treaties, agreements, or laws of Congress, or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property or business enterprises belonging to said tribe or held in

trust for it by the United States, or otherwise; including, *but without limiting the generality of the foregoing*, \* \* \*; (2) claims for damages resulting from the improper or unlawful expenditures of tribal trust funds, including trust funds created by \* \* \* the Act of March 28, 1908, entitled "An Act to authorize the cutting of timber, the manufacture and sale of timber, and the preservation of the forests on the Menominee Indian Reservation in the State of Wisconsin" (35 Stat. L. 51); \* \* \* (3) *claims for damages allegedly caused by the United States cutting timber on the Menominee Reservation contrary to the terms and provisions of the aforesaid Act of March 28, 1908 (35 Stat. L. 51);* (4) *claims for damages allegedly caused by maladministration on the part of the United States as respects its management of the timber and lumber industries of the Menominee Indian Tribe, in particular, its management of the Menominee Indian mills.* [Emphasis supplied.]

Sec. 3. *At the trial of any suit instituted hereunder the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations. No payment or payments which [60] have been made by the United States upon any claim or claims therein asserted or for the account of said Menominee Tribe of Indians nor any gratuities paid to or expended for said tribe or members thereof shall apply as an estoppel against said suit but may be pleaded as offsets. No gratuities, however, paid to or expended for said tribe or members thereof prior to the Act of Congress of March 28, 1908 (35 Stat. L. 51), or paid pursuant to any emergency relief legislation enacted subsequent to January 1, 1933, or*

out of any appropriations authorized by the Act of June 18, 1934 (48 Stat. L. 984), shall be pleaded by the *United States as offsets*. [Emphasis supplied.]

7. Congress has on several occasions waived the 20 MMBF limitation initiated in 1890, when a stringent limitation has been shown to be contrary to the best interests of the forest. For example, in the 1908 Act and in 1911 (Act of March 3, 1911, 36 Stat. 1076 § 26), Congress set aside the strict cutting limitation to allow harvest of dead and down timber. The limitation was again waived in the period 1949-51 to prevent mortality loss of large amounts of insect-damaged and diseased hemlock. (Act of May 31, 1949, 63 Stat. 144).

8. On July 14, 1956, President Eisenhower signed Pub. L. 721, 84th Cong., 70 Stat. 553, authorizing an increase of 2 MMBF in the annual timber cut permitted on the Menominee Reservation. The amendment deleted from the 1908 statute the words:

*Provided*, That not more than twenty million feet of timber shall be cut in any one year, \* \* \*.

The following was substituted:

*Provided*, That not more than twenty million feet of saw logs, veneer logs and comparable timber and not more than two million board feet of poles, posts, bolts, pulpwood and other miscellaneous forest products shall be cut in any one year.

9. On April 29, 1961, federal supervision and control of the reservation was terminated pursuant to the Menominee Termination Act of June 17, 1954, 68 Stat. 250, *as amended*. For a [61] more exhaustive discussion of the Termination Act, and its general impact on the Menominee Tribe, *see* opinion in Docket No. 134-67 (Basic) at pp. 5-18.

### C. Prior Litigation

10. Pursuant to the aforementioned 1935 jurisdictional act (Act of September 3, 1935, 49 Stat. 1085, as amended in 1938, Act of April 8, 1938, 52 Stat. 208), the Menominee Tribe brought several actions in the U.S. Court of Claims, alleging damages resulting from mismanagement of the Menominee Forest by the Government's agents. The mismanagement claims were tried first as to liability, the court ruling in favor of the tribe. *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442 (1950). A compromise negotiated by the parties and signed July 10, 1951, terminated further litigation of the issue of damages. *Menominee Tribe of Indians v. United States*, 119 Ct. Cl. 832 (1951).

11. The court's analysis in *Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950) elucidates the Congressional design for timber management which was embodied in the 1908 Act. After rejecting the Government's arguments that it had no responsibility to make the forest asset productive, the court stated that:

\* \* \* [I]t appears to us that the preservation of the forest, if not the primary purpose of the act, was at least considered by Congress to be equal in importance with the other purposes mentioned in the title and provided for in sections 2, 3, 4, and 5. We find no merit to defendant's contention, and the legislative history of the 1908 act set forth in part above relieves the matter of all possible doubt. [Emphasis supplied.] 117 Ct. Cl. at 495.

With respect to the specific duties imposed on the Government by the 1908 Act, the court continued as follows:

The term "selective" or "selection" cutting as it has been used in this case refers to the method whereby trees are specifically selected to be cut with the object of leaving the forest in such a condition

that a continuous or sustained yield of timber will result naturally. While the selection of the trees to be cut may be governed [62] to some extent by the demands of the current market, the meeting of such market demands does not relieve the forest manager from selecting trees to be cut with due consideration for the peculiarities of the various species, for maintaining a sufficient crown cover or canopy to prevent drying out of the forest floor, and from leaving enough specimens of valuable species to insure their reproduction. In a large uneven-aged forest such as the Menominee, where the stands are generally dense, the practice of selective cutting enables quick logging over large areas, thus removing the over-mature trees before they become decadent. This system also permits periodic cutting from the same area of an amount equivalent to the growth during the period when the cutting is done. The remaining stand is never denuded by such cutting and reproduction will generally start and be sustained in the small, protected areas so cut. This type of cutting permits the removal of trees that impede the growth of other trees and fairly old trees have been known to increase rapidly in size as a result of such release. It is also possible, by the use of this method, to bring about an improvement of the species in an area by leaving a greater proportion of the more valuable species as seed trees.

\* \* \* \* \*

It is true that the 1908 act does not use the expressions "clear cutting", "selective cutting", "physiological" or "commercial." However, we think it is quite clear, as pointed out above, that the act had as one of its purposes, equal in importance to the others, the preservation of the Menominee forest *in such a way that it would provide a continuing source of income to the Indians who could not, if its resources were depleted, move on to another forest.* While the



act did not specify the exact silvicultural method to be employed to accomplish this end, we must assume that Congress intended the Department of Agriculture and the Department of the Interior to devise some system which would bring about the desired result.

\* \* \* \* \*

Thus, although the 1908 act did not in so many words prohibit clear cutting, *it did, by plain* [63] *implication, prohibit the practice of any system of cutting that would be destructive of the forest and prevent that forest from being a continuing income-producing asset to the Indians.* Again, the act did not command in so many words the use of the selective cutting system—yet, having in mind the preservation purposes of the Act, the fact that maturity used in connection with the preservation of such a forest as the Menominee could only mean physiological maturity, the direction to cut such matured and ripened green timber as the forestry service shall designate—we can only conclude that the language and legislative history of the act point irresistibly to something like the system of selective cutting in the management of the forest.

\* \* \* \* \*

[The 1908] act was clearly passed for the protection of the Indians in order to secure for them a steady income from their property to be brought about by proper management on the part of the Government. Preservation of the forest was one of the purposes of the act. The proper designation of the timber to be cut was one of the ways specified for effectuating that purpose. Failure to do so in some manner that would accomplish this purpose was a failure to carry out an order designed for the protection of the Indians for whose benefit the Act was passed, and was a violation of what we can only consider to be a mandatory provision in the Act.

\* \* \* \* \*

We do agree with defendant that Congress probably did not contemplate the maintenance of conditions in the Menominee forest as they existed in 1908. From the legislative history referred to previously above, we believe that *Congress hoped for a great improvement in the forest conditions on the reservation.* [Emphasis supplied.] *Id.* at 496, 499-500, 502, 506-07.

Finally, the court applied the required fiduciary standards to the Government's management:

[64] *Next the defendant says that in the logging operations conducted on the reservation from 1910 to 1928, the Government exercised the good faith, diligence, care and prudence required of it as a trustee and guardian of the plaintiff. With this we cannot agree.* \* \* \*

\* \* \* \* \*

Those officials knew that the lumber business of the Menominee Indians could not be conducted along the lines of the usual private commercial enterprise where the owner of a forest can sell or abandon it and move on to another. They also knew that the forest constituted almost the only income-producing asset belonging to those Indians. We cannot believe that these officials, assuming them to be prudent men, would have conducted their own businesses or private affairs in the manner in which they conducted the affairs of the Indians, assuming also, of course, the same conditions or restrictions existed in their circumstances as did in the case of the Indians. *We conclude that the United States has not fulfilled the required standards applicable to an ordinary fiduciary in its management of the timber operations on the reservation either as a commercial or industrial enterprise or in the preserving of the Indians' only capital—the forest.* [Emphasis supplied.] *Id.* at 507-08.

12. There is overwhelming evidence that the determination of liability in the 1950 *Menominee* decision of the court affected defendant's management of the forest in the decade following. The judgment generated much concern among defendant's agents as to how best to follow the instructions of the court, while at the same time managing the forest according to proper silvicultural principles. In a memorandum dated December 27, 1950, L. D. Arnold, Chief of the BIA Forestry Branch, catalogued some of the difficulties presented by the judgment, and suggested seeking a legislative remedy. The memorandum states in pertinent part:

We believe that the methods we are at present following in managing the Menominee Forest and in designating timber to be cut are in some [65] respects directly in opposition to the methods that the court has held should be followed. We might be able to overcome this situation through an unwieldy adherence to a procedure that would be in keeping with the findings of the court, but we are of the opinion that this would result in poor silvicultural treatment of the forest. We believe that the proper solution is through corrective legislation.

\* \* \* \* \*

If, as the court has held, the 1908 act permits the cutting of only the physiologically mature timber, the solution appears to lie in corrective legislation in order to permit the application of forest management practices which, in the light of present day knowledge, are best applicable to conditions within the Menominee Reservation Forest. Until such legislation is enacted it appears that we must do one of three things, namely:

1. Continue our present cutting practices despite the court findings in the expectation that our actions will be upheld subsequently. This

course might expose the United States to future suits for damages.

2. Proceed immediately to designate only the dead and down, the overmature, and the physiologically mature trees for cutting. *If we endeavor to do this it will increase the cost of forestry and logging activities and may result in forest practices that we ourselves cannot justify. In this case we will again be subject to the charge of maladministration.*

3. Cease all cutting operations until corrective legislation is enacted. This is obviously undesirable and might also lead to charges of maladministration.

Since each of the three possible courses of action may expose us to the charge of maladministration it is apparent that remedial legislation should be sought as promptly as possible.

\* \* \* \* \*

[66] The 1908 act limits cutting operations to a maximum of 20 million feet annually, except that an amendment of the act permits the cutting of 25 million feet in each of the fiscal years 1949, 1950, and 1951. *This arbitrary limitation of the cut is not necessarily sound from the viewpoint either of good business or of proper technical management of the forest.* We believe, therefore, that legislation should be enacted to modify this limitation of the cut. We are giving further thought to the specific provisions that should appear in such legislation.

In view of the serious consequences which may result if we continue present practices it is urgently recommended that we seek remedial legislation as promptly as possible. In the meantime we request instructions as to the course to be pursued in man-

aging the Menominee Reservation forest. [Emphasis supplied.] (P. Ex. B-15 at 2-4).

13. The claim in the instant case is premised upon defendant's alleged mismanagement of the Menominee Forest from July 10, 1951 to April 30, 1961, that is, from the date of resolution of the prior claims in the 1950-1951 decisions, to the date of termination of federal supervision over the Menominee Tribe and its assets as described in an earlier opinion hereon. (Docket No. 134-67 (Basic). Defendant's mismanagement during this period is alleged to constitute a breach of its fiduciary obligation as trustee and guardian of plaintiffs and their property.

14. Plaintiffs also seek damages for the period from April 30, 1961 to December 1, 1971, for defendant's alleged acts of mismanagement prior to termination, and its failure to prepare, provide for and protect plaintiffs in their assumption of responsibility over the Menominee Forest up to and in the period following federal termination.

## II. DEFENDANT'S MANAGEMENT OF THE MENOMINEE FOREST

### A. *General*

15. Plaintiffs offered testimony and reports of several expert witnesses in support of this forest mismanagement claim. [67] These experts included George Banzhaf, William H. Banzhaf, Richard C. Winslow, and Wesley Rickard. The qualifications of these experts have been set out in the Deed Restrictions opinion, Docket No. 134-67-A, specifically in finding 23 and in the text at pp. 13-15. In addition to the above, Dr. Duncan A. Harkin was offered by plaintiffs in rebuttal.

16. Defendant's expert witnesses were Stanley F. Miller, Jr., Norman E. Breisemeister, Edward F. Steiger-

waldt, Sr., and John Carow. Their qualifications are also set forth in the Deed Restrictions opinion at finding 48, and in the text at p. 15. Mr. Lee Winner, who served as forester at the Menominee Reservation beginning in 1948, and as forest manager from 1955 until termination of federal supervision in April 1961, also testified for defendant. (Tr. at 507-10).

17. The introduction of the timber cutting budget for the Menominee Forest for the period 1951-1965, written in 1950 by forest manager John W. Libby, states that a system of selective cutting was inaugurated in the forest in 1936. (D. Ex. 26-R at 2). Beginning in 1938 the forest was operated under a plan that was to control the first ten years of cutting. The cutting cycle was not completed on schedule, partially because the foresters' estimates were based largely on a 1914 cruise, supplemented by spot cruises, and because production from several areas was found to be greater than expected.

18. A proposal was made as early as 1941 that there should be developed more up-to-date forest inventory information by means of a "strip cruise," that is, a sampling of small but representative areas through the forest to support an estimate of the entire forest volume. Richard Delaney, then forest supervisor of the Menominee Forest, disclaimed the need for a cruise, concluding that it would be time-consuming and expensive. Moreover, he noted:

For this expenditure the tribe would receive a mass of cold, complicated data from which dependent entirely upon interpretation, could be constructed a clear and reasonably accurate picture of their forest resources, or from which could be developed a maze of conflicting issues with which to becloud and hamper the proper management of those resources. The latter appears the thing most likely to happen. (P.Ex. B-19, dated April 5, 1941, at 3).



Mr. Delaney had estimated the cost of a cruise of the Menominee Forest in 1941 at approximately \$22,700. (*Id.* at 6).

[68] 19. Plaintiffs' expert, Mr. Rickard, testified at trial concerning the feasibility of such a forest survey:

[Mr. Iadarola]: In your opinion, is the expenditure of \$22,700 to obtain the forest inventory of Menominee, is that too expensive or time consuming?

[Mr. Rickard]: Because of the importance of that data to sustained yield management, no sir, that cost is well within reason and cheap for the price. In addition, that data would have been a justification for the removal of the restriction on harvest, and would have resulted in added income to the Menominees, plus the betterment of their forest. (Tr. 188-89).

Similar conclusions were reached by plaintiffs' rebuttal witness, Dr. Harkin.

20. By 1948, the forest had been divided into 17 blocks for inventory purposes, and "plot cruises," consisting of 1/5 acre plot samples, had been initiated. (D. Ex. 101-R at 59). Defendant's forester, Lee Winner, added technology to the inventory process by computerizing the plot cruise inventories. (*Id.* at 60).

21. Early in his tenure at the forest, Mr. Winner came to the conclusion that the old line cruise "was falling apart as they became older and older in history." (Tr. 514). He testified that there was a lot of old data in the files that was not being updated, and that certain necessary information was missing. (Tr. 515-16). In order to prepare the new cutting budget for 1951-1965, it was his conclusion that the Menominee foresters needed to determine the total area of the forest by blocks. (Tr. 516). It is clear that the need for more comprehensive inventory data was well recognized.

22. In the 1950 cutting budget and management plan, then chief forester Libby estimated that total timber volume in the forest exceeded 1000 MMBF. He also noted that management of the forest was hampered by the 20 MMBF harvest limitation, stating that:

\* \* \* [I]t is unfortunate that aspen production is not exempted from legal cutting limitation. Aspen must be cut when ripe or it is lost \* \* \* unless aspen is exempted from legal cutting restrictions, the time is not too distant when the Menominee Forest [69] will sustain an annual loss of volume in this species because it cannot be harvested as rapidly as it matures. It will be better to lose that volume than to reduce the cut of other more valuable species in order to permit its utilization. (D. Ex. 26-R at 12).

23. In January 1951, a Forest Management Conference was held at the Menominee Reservation to reexamine the current forest inventory methods and to establish plans for future timber harvests. In attendance were reservation officials, including Menominee Forest supervisor Walter J. Ridlington and his assistant, Lee Winner; R. W. Dickinson, manager of the Menominee sawmill; George Gevorkiantz and C. D. Chase, two highly respected foresters of the U.S. Forest Service's Lake States Forest Experiment Station; W. Parker Arthur and T. M. Holt of the U.S. Indian Service; and C. B. Scott of the U.S. Forest Service. (D. Ex. 30-R). The transcript of the conference contains the following summary of points agreed to by the participants:

The following points and steps in procedure were unanimously agreed upon by those in attendance:

1. All survey work should be accomplished to obtain the desired accuracy by units of types within the management block.
2. Permanent sample plots shall be established in all the work, rather than temporary ones.

3. An additional 200 —+ permanent sample plots will be established in the unsurveyed area (including block 5) of 93,000 acres. The purpose of these plots shall be to determine an immediate answer for total volume on the Reservation. These plots shall, of course, be so located as to form an integral part of the future plot system to be made accurate by block units. \* \* \*
4. A contact will be made with the Wisconsin Forest Survey Personnel to establish cooperation with them on the Reservation portion of the proposed county aerial survey. \* \* \*
5. Establish permanent sample plots in management block 5, and 100% type map this block from aerial photos. The estimate to be made accurate for the [70] block in accord with the overall plan of establishing a "block accurate" plot survey in all of these management divisions.

The following points, while not specifically agreed upon, due to a shortage of time, can be accepted as conclusions agreeable to all persons in attendance.:

1. 100% type mapping from new aerial photos, to be obtained upon completion of flying by the P. & M.A. on the unsurveyed or entire Reservation, as determined to be necessary and desirable by the Forest Supervisor.
2. Make periodical necessary adjustments in number and location of plots to insure representative sampling of areas coming into merchantability.
3. After completion of necessary photo interpretation, survey for forest products (posts, poles, pulp, and box belts), using permanent sample plots.

4. Prepare an overall forest management plan for the entire Reservation, including sawlogs, and forest products.

A discussion outline of questions and answers is also illustrative of the issues raised and opinions of the foresters:

The discussions at the meeting centered around a list of questions pertaining to surveys and management problems. The answers to those questions as obtained from the discussions are listed here as a summary to the meeting.

1. How can we salvage much of our 10% Cruise data? Where must we hold the line on any further breakdown of this data?

There is no need to keep the 10% cruise data current by means of a detailed bookkeeping system. The data has its value in being a historical base. Corrections, as shown by [71] plot remeasurements, when applied to the base data, will serve to bring the base up to date. Changes occurring in the forest will be reflected in the established plots.

2. How can we best use the details of plot information now on hand?

The plots serve to establish volumes, indicate growth rates, and in general, answer any questions that may be in the Forest Manager's mind, concerning happenings in the woods. When used to answer a specific question that involves anything less than the total plot volumes, the data may not be correct within the desirable statistical limits; however, it will provide valuable information as to trends.

3. What use should we now be making of gathered and computed 10% cruise data?

There is really no need to be concerned about the use of 10% cruise data beyond that which has been made of it. The value of this data is primarily historical. Actually, volumes were used to develop the second cycle cutting budget, and the field maps have been and will continue to be widely used.

4. Should 10% cruise with growth plot controls be undertaken as logging progresses in uncruised blocks?

No, this will not be necessary. The uncruised blocks will be plot cruised to 15% accuracy. This will be sufficient for management purposes.

5. Are plot cruise and 10% cruise compatible?  
[sic]

Yes, since they both serve to furnish management with volume answers for those acres covered.

6. Are the growth figures as presented from Blocks 2, 2A and 3 indicative of overcutting?

Not necessarily, the data covers a limited area of the Reservation and may not be representative of the entire area. Any cutting that has occurred in those [72] blocks, since plot establishment, was necessary to prevent loss of mortality. Too, the period is a relatively short one from which to draw sweeping conclusions. If it should later be determined that overcutting has occurred, adjustment of cut in that area must be made in years to follow in order to bring back proper level of growing stock. The present annual cut limitation is also a very weak figure. The primary job at present is to either prove or disprove it.

7. Should we plot cruise the entire Reservation as a unit to give the management plan a basis in fact?

Yes, an additional 225 plots established in uncruised areas, when combined with 200 of those already established in cruised areas, will provide per acre volumes of saw log timber for the entire Reservation, correct to 10% statistical limits. The 225 new plots will be randomly placed, along mechanically selected strips, in such manner as to permit of their being used to cruise individual blocks to within 15% limits.

8. What is the groups attitude toward an aerial survey to be followed up by making a condition class map?

Upon completion of P. & M.A. Aerial survey, the panchromatic prints will be purchased. These will be used to fullest extent possible, to obtain a condition class map of the Reservation. This map will give area figures against which per acre volumes of the Reservation wide plot cruise will be applied.

9. How can we develop a management plan for Forest Products?

Survey of forest products will be delayed until such time as a condition class map has been completed. This will facilitate locating those areas that must be sampled.

10. Should an estimate of mortality not salvaged be made each year and deducted from allowable cut? How else [73] can production department be sparked with sufficient incentives to devise means of gathering small volumes of salvage? The answer is primarily administra-



tive. A practical limit of salvageable volume should be determined, and where that volume is located, a logging area should be designated. It then becomes a part of the annual cut. The suggestion was made that the Reservation be divided into salvage units, with gyopo loggers maintaining their areas clean. Where salvage material alone will not support the individual, he then could log standing timber to contribute his share to the annual cut.

11. What is responsibility of Forestry in supplying specific species, etc. (question #10 of outline).

Answer to this question purely administrative and could not be answered by the group.

24. In January 1952, the Menominee foresters were provided with their first comprehensive look at the composition of the forest upon completion of the Continuous Forest Inventory's (CFI) first complete measurement (383 plots and 5,000 trees), and publication of a "Stand Structure Analysis." This inventory indicated a volume of 1224 MMBF, compared with a 1914 cruise inventory of 849 MMBF (Banzhaf Report, Table XIII, App. A). The exact magnitude of the change is subject to some doubt, however, because of a shift in standards of merchantability and utilization between 1914 and 1952 (*Id.* at 19). The inventory also indicated that the annual harvest (over a 15-year cutting cycle) could be increased to 22.4 MMBF. (D. Ex. 101-R at 82).

25. Defendant's forester, Winner, deemed the 1952 inventory "but a preliminary step toward development of a complete management plan." (D. Ex. 33-R at 1). Mr. Winner testified at trial that other data would have been required to complete the picture of the Menominee Forest condition, such as type or condition class maps and aerial photographs of the forest. (Tr. 518). A "condition class"

map would show the combination of tree sizes and density within a given area. It would indicate the total timber volume per acre and the overall stand structure. Such a map is useful as a unit of silvicultural control because it ensures that all areas of a commercial forest of the same type and condition class receive the same treatment regardless of where they occur and the extent of acreage involved.

26. Defendant's experts also concluded that because it was merely a "first look" at the Menominee Forest volume, no [74] action could properly have been taken on the basis of the 1952 inventory alone. (D. Ex. 101-R at 84). It was their opinion that confirmation of the inventory results by means of aerial photography, or a second volume remeasurement, would be required to ensure the accuracy of the inventory which had been taken. (*Id.* at 84-85).

27. There is no suggestion in the record that defendant was prevented by technological or other barriers from obtaining whatever additional forest information that was necessary in the opinion of defendant's witnesses at trial. In fact, there is persuasive evidence that the additional information they suggest was readily available. Aerial photographic techniques were known by defendant's agents on the reservation to have been used at other nearby forests with "excellent results," and to be capable of producing—

type maps and inventories of National Forests in the Lake States which are more accurate, and which are obtained at considerably lower cost, than can be secured by ground survey methods.

(D. Ex. 22-R. letter dated February 9, 1948 from R. W. Dickenson, Manager of the Menominee Indian Mills to L. D. Arnold, Director of Forestry, with carbon copies to the Regional Forester and the District Forester). Mr. Dickenson estimated the cost of the requisite aerial survey at \$1500.

28. Menominee foresters were informed at the aforementioned 1951 management conference that aerial surveys of an Indian forest in Minnesota under BIA control had been completed within the past year. It covered 407,000 acres and was completed at a cost of approximately \$7,000. (D. Ex. 30-R at 18-20). Mr. Gevorkiantz of the U.S. Forest Service commented: "If you were to get pictures by this summer you could get your map completed by next winter." (*Id.* at 74-75). Both foresters Ridlington and Winner also expressed a strong interest in obtaining an aerial survey, stating that it would be very helpful in determining an accurate forest inventory, and that it would be relatively inexpensive. (*Id.* at 56-57).

29. Immediately following the January 1951 conference, F. G. Wilson, Superintendent of the Wisconsin Conservation Department, wrote to Mr. Ridlington that he would—

have no difficulty in securing the aerial photographs covering the reservation since they can [75] be purchased at cost from the PRODUCTION AND MARKETING ADMINISTRATION at Washington. (Letter dated February 6, 1951, D.Ex. 30-R).

30. Despite the recognized importance, availability and practicality of aerial surveys, the record does not reflect any efforts by defendant's agents to secure them until 1955, 4 years after the above-described conference. An aerial survey was not made until 1955, and it was not interpreted until 1957 after an additional 2-year delay. In 1957, a condition class map was finally drafted from the photographs. (*Id.* at 532).

31. Defendant was not hampered by the Menominee Tribe in its efforts to obtain additional inventory data. Mr. Parker Arthur, employed by the BIA to conduct cruises of the Menominee Forest, stated at the 1951 conference:

I have gathered that we were interested in determining how much volume there was on the reservation. The tribe was continually asking for this figure and no doubt had good reason to ask \* \* \*. They would have been willing, I believe anxious in fact, in some years to have allotted enough money to have completed a cruise of the reservation to find out how much timber they had. (D. Ex. 30-R at 29-31).

32. In the spring of 1955 plot remeasurements were made indicating to Mr. Winner that an annual volume of about 23.7 MMBF could be safely cut without exceeding annual growth. His was a conservative estimate. It was arrived at after reducing the actual measurements by approximately 40 percent to allow for statistical error, and to establish a reserve which he called a "forest emergency fund." However, it was not until the following spring that any recommendation was made on the basis of this data. (P. Ex. B-11 at 3).

33. Later in 1956, acting on a resolution by the Menominee General Council (D. Ex. 13-D at 2), Congress granted a 2 MMBF increase in the statutory harvest limitation. The increase was, however, limited to forest "byproducts." No increase in the lucrative sawlog harvest was authorized. Mr. Winner testified at trial that the 2 MMBF increase provided an additional sawlog harvest of only .5 MMBF (the amount of the original 20 MMBF limitation that previously had to be used to cover "byproducts"). He testified that he believed at the time that a higher limitation was required. He acknowledged, nevertheless, that his view "was not pushed in the request for the legislation." (Tr. 538).

[76]

#### B. *The Banzhaf Study*

34. The Banzhafs conducted an in-depth study of defendant's management of the Menominee Forest during the period 1951-1961. Their findings are set forth in

plaintiffs' Exhibit No. B-2 (hereinafter, the Banzhaf Report). Their report is based on field inspections of the Menominee Forest, reports and other literature involving the forest, reports, records and correspondence of the BIA at the Federal Records Centers in Kansas City, Missouri, Chicago, Illinois, and Washington, D.C., and forest products market conditions during the period in question. (Banzhaf Report at 3). The study itself and its calculations of damages were carefully and thoroughly constructed and are entitled to considerable weight.

35. The Banzhaf investigation focused on five areas of alleged mismanagement, namely:

1. the 20 MMBF limitation on annual harvest;
2. overstocking of the Menominee Forest;
3. the level of hemlock harvest;
4. the level of pulpwood harvest;
5. the possibility of an increased harvest of veneer logs for sale on the open market or for manufacture in a tribal veneer mill. (Banzhaf Report at 1-3).

The report concluded "[t]hat the Bureau of Indian Affairs mismanaged the Menominee Forest in all of the five areas of investigation." (Banzhaf Report at 1). The findings which follow review each of the areas covered in the Banzhaf Report.

#### 1. *20 MMBF Statutory Limitations on Annual Harvest*

36. The Banzhafs testified that the dominant factor in defendant's management of the Menominee Forest during the 1950's was the 20 MMBF limitation on cutting imposed back in 1890. The evidence shows that this limitation restricted the flexibility of the forest managers, thus preventing them from practicing "good forestry" in both the biological and economic sense. George Banzhaf testified that the limitation constituted—

a managerial straitjacket. It was impossible \* \* \* to take advantage of market trends or of correcting overstocking conditions or anything else of that nature. (Tr. 156-57).

[77] A major consequence of the strict limitation on harvest was a high level of "mortality loss":

The reduction of natural mortality is one of the most important tasks of management because it represents volume and value usually lost forever. The obvious way to control it is to cut out old growth timber and utilize it *before* it has a chance to lose its value, and at the same time provide growing space for young, vigorous timber. There is no place in the economically managed forest for old growth—it adds very little or no value to the forest because of its low growth rate and is more susceptible to disease and insect infestations, both often resulting in death before its value can be realized. Unfortunately, the legal limit of 20 MMBF did not allow the removal of this high priority timber within the law. (Banzhaf Report at 19-20).

37. In his 1961 Forest Management Plan, Mr. Winner described some of the effects of the statutory limitations as follows:

At the previous legal annual cut limit of 20MMBF, however, it has been physically impossible to adjust levels of growing stock, to harvest all priority material, and to complete the [cutting] cycle within the allotted time.

\* \* \*

\* \* \* At this level of harvest \* \* \* there remains, and for several cycles would remain, a substantial amount of overstocking in stands classed as large sawtimber and good density (indeed the bulk of the sawlog area). This is not a condition conducive to either maximum growth rates or minimum tree mortality. (P. Ex. B-12 at 6, 9).



(See and compare findings 76-80 in the Deed Restrictions opinion, Docket No. 134-67-A).

38. There is evidence that defendant's agents were aware as early as 1940 of the fact that the 20 MMBF limitation would result in an increase in net volume. (P. Ex. B-7 at 3). Forest supervisor Richard Delaney so stated in a report on the long-range management of the forest.

[78] 39. The 20 MMBF limitation was also the subject of a memorandum dated December 27, 1950, to BIA Assistant Commissioner Utz from L. D. Arnold, Chief of the BIA Forestry Branch. The memorandum states in part:

This arbitrary limitation of the cut is not necessarily sound from the viewpoint either of good business or of proper technical management, of the forest. We believe, therefore, that legislation should be enacted to modify this limitation of the cut. (P. Ex. B-10 at 4).

40. Discussion of the harvest limitation at the earlier described January 1951 conference on the reservation, confirms that Menominee foresters believed that the limitation handicapped the management function. (D. Ex. 30-R at 58-59). Mr. Cal Scott of the U.S. Forest Service discussed the necessity of obtaining more complete inventory information, noting the need for "finding out whether \* \* \* [the foresters] could cut 35 million or 19 million B.F. a year." (*Id.*) Another forester at the conference, Mr. Gevorkiantz, made these comments about the harvest limitation:

I can't see a figure like twenty million. Can't you remove that limitation on twenty million feet per year? If it is twenty million or die, where does the management come in? *You can't start out with the rule before you find out what it ought to be.* Now you have to go and find out what it ought to be. I

personally am quite sure that ify [sic] you have good statistics and good dope, somebody will put pressure on and it will have to be revised. [Emphasis supplied.] (Id. at 88).

He later stated, in reference to the general problem of managing the forest, that "I can't see anything that a set of plots won't answer for you \* \* \*." (Id. at 97). The conference ended with total agreement that more inventory information should be immediately obtained to determine the precise level of allowable harvest.

44. In a Stand Structure Analysis dated January 1, 1952, summarizing the latest forest inventory, Mr. Winner divided the timber of the forest into four cutting priorities. Priority 1 was defined as "[a]ll trees of greatest risk, regardless of vigor." Priority 2 was defined as "[a]ll trees of lowest vigor, medium and good risk." (D. Ex. 33-R at 2). Mr. Winner found [79] that, based on the latest available inventory, cutting *only* these first two priorities (over a 15-year cutting cycle) would result in an annual harvest of 22.4 MMBF, or 2.4 MMBF in excess of the limitation. (Id. at 5). Since that amount exceeded the limitation set by Congress in 1890, Mr. Winner reluctantly concluded that some of priority two would have to be left unharvested. But he noted "[i]t is this volume of priority 2 that remains behind from which one might expect to suffer the majority of mortality loss." (Id.)

42. In 1954 Mr. Winner authored a management plan for the Menominee Forest, based on data obtained from the 1952 inventory. There he noted that the allowable cut had remained static since 1890, in spite of the fact that—

declared forest volume has changed, and probably will continue to change, as [a] result of increased logging mechanization, greater merchantability of species, improvements in forest sciences, and devel-

opment of more effective protection services. (P. Ex. B-6 at 16).

He concluded that a comparison of 1914 and 1954 inventory volumes "would indicate an allowable cut of 25,128,000 B.F." (*Id.* at 17).

Mr. Winner concluded that:

[I]n 1890, when the existing 20 MMBF legal limitation to allowable cut was first established, completely different forest conditions, standards of merchantability, and other economic factors were at play. It seems only sensible to review for alteration (or confirmation if such should be the case) an allowable cutting rate established by Congress 64 years ago, and then take steps to quickly adjust to these findings. (*Id.* at 23).

43. Mr. Winner's 1954 plan also included a table of the percent of reservation land by uses for both 1930 and 1952. The table indicated that the sawlog area had increased from 39 percent to 56 percent, and that the non-merchantable area had decreased from 41 percent to 19 percent during that period. (*Id.* at 38).

## 2. Overstocking

44. One of the most important responsibilities of a forest manager is the manipulation of growing stock in the forest. The [80] level of growing stock can be described by volume and number of trees per acre, and their distribution by size and basal area. "Basal area" is defined as "the cross-sectional area of the tree at 4.5 feet above the ground. It is usually expressed in square feet per acre." (Banzhaf Report at 13, n.21). Overstocking exists where growing stock has not been sufficiently controlled, usually resulting in "a stagnation of growth and in an increase of natural mortality resulting in the loss of valuable timber." (Banzhaf Report at 14).

45. There is ample evidence, uncontroverted by defendant, that the Menominee Forest was seriously overstocked during the period here in dispute, because of the 20 MMBF limitation on annual harvest. The optimum level of stocking for maximum growth of northern hardwood sawtimber, adopted with some adjustments by Mr. Winner in the 1951 Forest Plan (P. Ex. B-12 at 21), was based on a Station Paper dated July 1950, authored by Messrs. Eyre and Zillgitt of the Lakes States Forest Experiment Station, St. Paul, Minnesota. This study is referred to as "the 'bible' on hardwood management in the Lakes States by professional foresters." (D. Ex. 101-R at 83). Based on a comparison with the Eyre and Zillgitt optimum levels of stocking, Mr. Winner concluded that in the Menominee Forest:

[T]here remains \* \* \* a substantial amount of overstocking in stands classed as large sawtimber and good density (indeed the bulk of the sawlog area). This is not a condition conducive to either maximum growth rates or minimum tree mortality. (P. Ex. B-12 at 9).

The testimony of defendant's expert, Mr. Steigerwaldt, was in accord. (Tr. 648). Specifically, Mr. Winner concluded that overstocking and necessary cutting of priority trees alone (without even considering new growth) justified an increase in the harvest limitation to 30.3 MMBF. (D. Ex. 46-R at 48).

46. There is also ample evidence that defendant was aware of the overstocking, at least from the date of the 1952 inventory. Mr. Winner's calculations in the 1954 Forest Management Plan indicate that the Menominee Forest was substantially overstocked when compared with "suggested normal" volume and number of trees per acre set forth in the Eyre & Zillgitt Station Paper. The table illustrating Mr. Winner's calculations is set forth below:

[81]

DBH	Trees/A Menominee	Trees/A Suggested "Normal"	Volume/A Menominee	Volume/A Suggested "normal"	% Volume Dia Class Menominee	% Vol Dia Class Suggested "normal"
10	15.6	7.0	263.0	159.3	2.8	3.8
12	12.3	5.9	749.2	359.4	8.0	8.6
14	9.6	4.8	966.0	483.0	10.3	11.5
16	7.5	3.7	1105.2	545.3	11.8	13.0
18	5.8	2.8	1165.9	562.8	12.4	13.4
20	4.3	2.0	1124.7	523.1	12.0	12.5
22	3.1	1.4	1020.1	460.7	10.9	11.0
24	2.1	.9	847.6	363.3	9.1	8.7
26	1.4	.6	679.2	291.1	7.3	7.0
28	.8	.4	458.8	229.4	4.9	5.5
30	.5	.2	334.4	133.8	3.6	3.2
32	.3	.1	231.3	77.1	2.5	1.8
34	.1		140.9		1.5	
36	.1		99.7		1.1	
38	.1		112.0		1.1	
40	.05		62.5		.7	
TOTAL	63.65	29.8	9360.5	4188.3	100.0	100.0

Key to table on page [81], finding 46, *supra*.

DBH:	Diameter at Bicast Height, in inches
Trees/A Menominee:	Number of trees per acre in the Menominee Forest
Trees/A Suggested "Normal":	Number of trees per acre considered normal in the Eyre & Zilligitt Station Paper
Volume/A Menominee:	Volume of timber per acre in the Menominee Forest
Volume/A Suggested "Normal"	Volume of timber considered normal in the Eyre & Zilligitt Station Paper
% Volume Dia Class Menominee	Percent of the total Menominee Forest volume in each 2-inch diameter class
% Vol Dia Class Suggested "normal"	Percent of total forest volume in each diameter class considered normal in the Eyre & Zilligitt Station Paper

Note that the Eyre and Zilligitt "suggested normal" total volume per acre is less than *half* of the actual Menominee Forest estimates. This is an unambiguous indication of severe overstocking.



[83] 47. The 1952 inventory also revealed overstocking in terms of desirable basal area when compared with findings of the Eyre and Zillgitt study. The Banzhaf Report states that the suggested normal basal area is 72.0 square feet per acre. The basal area in the Menominee Forest was 89.2 square feet per acre. (Banzhaf Report, table XIV). The enormity of the difference between the stocking permitted to develop in the Menominee Forest and suggested normal stocking is diminished somewhat by Mr. Winner's *caveat* in the 1954 plan that the Eyre and Zillgitt figures are not strictly applicable to the Menominee situation. He stated:

The reader is warned, however, 'that this interim guide was developed in one locality' (Duke Experimental Forest, Marquette County, Upper Peninsula, Michigan) and must therefore, be used with caution. Also, the Menominee forest is on the average, a much denser stand with a substantial volume of larger trees. To attempt bringing this forest in line with the suggested 'normal' simply for the sake of conformity would be sheer folly, contrary to the principles of concentrated liquidation of high risk, low vigor trees. We recommend, and are planning for the management of trees on a cutting priority rather than on diameter class distribution basis—especially since the stand table shows an abundance of smaller diameter classes. It is altogether possible that the suggested 'normal' will be approached and eventually paralleled, but this prospect is so far in the future that it may be ignored at this time. (1954 Plan at K).

48. Defendant attempts to counter strong evidence of overstocking by emphasizing that the 1952 inventory was not by itself conclusive, and that the inventory could not precisely indicate the location of the overstocked stands. However, it does not deny that the forest was overstocked, nor does it deny that defendant's agents were aware of the overstocked condition.

## 49. The Banzhaf Report concludes:

It is our opinion that the BIA forest managers had the data necessary in 1952 to have made the decision to reduce stocking, and should have commenced on a program no more conservative than that described above. The necessity of reducing excess stocking was no less great in 1952 than [84] 1960 when Winner so strongly advocated it. It was in the best interests of both the forest and the Menominees, and would have provided a more vigorous, rapidly growing stand of timber. Also, it would have released capital enabling the Menominees to undertake the industrial expansion so strongly recommended the previous year at the Forest Management Conference of 1951. It would have created more jobs on the Reservation, and returned higher annual stumpage payments to the Tribe and it would have improved the forest. The levels of stocking left after excess volumes had been removed would have remained approximately 8000 feet in northern hardwood stands, almost 10,000 feet in hemlock stands, and 17,000 feet in pine stands. There is no way this can be described as decimating the forest. In addition, Winner's plan allowed understocked stands to be spared the ax, except for high risk trees, to permit the stocking to increase. (P. Ex. B-2 at 36-37).

3. *Level of Hemlock Harvest*

50. The level of hemlock harvest, like that of other species in the Menominee Forest, is inextricably bound up with the 20 MMBF annual harvest limitation. The stumpage value of hemlock, upon which stumpage payments to the tribe were based, averaged only \$17 per MBF during the period on which the claim is predicated. The average for all other species (excluding hemlock) was \$27. Including hemlock, the average was \$23. (Banzhaf Report at 11). The 1952 inventory indicated that

hemlock represented 27 percent of the forest sawtimber volume in 1952. However, cutting records for 1952-1960 show that 32.3 percent of the total volume harvested was hemlock (Banzhaf Report at 9). Thus, a relatively less valuable species constituted a disproportionately large part of the annual harvest. Mr. Winner explained the heavy hemlock cut as follows:

[T]he liquidation trend of hemlock in favor of hardwood [was] a result of this species' defiance of management techniques. (P. Ex. B-6 at 17).

Specifically, hemlock is unusually prone to mortality loss because its roots are close to the surface, making it susceptible [85] to death from drought and blow-down in high winds, and because of its susceptibility to disease and insect attack. (Banzhaf Report at 10).

51. Thus the disproportionate hemlock harvest resulted from defendant's attempt to improve the forest silviculturally, that is, hemlock was harvested to allow for its replacement with more valuable and durable species. As a result, however, the short-term financial condition of the mill suffered because the less valuable hemlock occupied almost one-third of the allowable harvest.

52. Defendant's mill manager, Mr. Dickinson, later reported that he was well aware of the adverse effect of a disproportionate hemlock harvest on mill operations. He stated, however, that at the time he could not persuade forest manager, Ridlington, to alter the cut. (Letter-report dated October 13, 1971, P. Ex. B-4 at 3).

53. Plaintiffs conclude the the defendant should have cut the hemlock without counting it against the annual harvest limitation, or that they should have in the alternative sought an amendment of the 20 MMBF limitation.

#### 4. *Level of Pulpwood Harvest*

54. The Banzhaf study concluded that the 20 MMBF annual limitation also caused undercutting of pulpwood. From 1951 to 1960, 92.9 percent of the total Menominee

timber harvest was made up of sawlogs and only 5 percent was cut as cordwood which is used primarily as pulpwood. (Banzhaf Report at 38). The Banzhafs concluded that, absent the statutory limitation, 5 MMBF of pulpwood could have been harvested each year.

55. Most pulpwood comes from aspen, which is known to have a relatively short lifespan, and to deteriorate rapidly after maturity. In 1950, forest supervisor, Libby, wrote:

[I]t is unfortunate that aspen production is not exempt from the legal cutting limitation. Aspen must be cut when ripe, or it is lost. (P. Ex. B-25, at 12).

Because of these characteristics, plaintiffs claim all of the potential 5 MMBF was lost.

56. The 1952 inventory covered only sawlog timber, and did not reflect the volume of pulpwood trees such as aspen. The [86] Banzhaf Report concluded, however, that based on a physical inspection, "the abundance of pole-sized aspen should have been obvious to anyone familiar with the property." (Banzhaf Report at 40). Certainly the approximate volume of merchantable pulpwood was known to defendant by 1958, when a Government forester recommended a cut of 30,000 cords (15 MMBF) annually. (P. Ex. B-20 at 21).

57. There is some question as to the existence of a pulpwood market in the 1950's. Mr. Winner stated in 1959 that "there is not now and never has been either a sound market for sale or a sound program for harvest [of byproducts]." (P. Ex. B-23 at 17). However, a national forest bordering on the Menominee Forest sold over 23 MMBF of aspen pulpwood annually between 1955 and 1960, at an average price of over \$2.00 per cord. (P. Ex. B-24). In addition, the 1951 annual forest report noted that a paper company 40 miles from the reservation "took all that we could deliver" of pulpwood material. (P. Ex. B-14 at 30).

### 5. Veneer

58. Logs are most valuable when converted to veneer, a fact reflected in the high stumpage prices paid for suitable veneer logs. A veneer log must be larger, straighter, and freer of knots and defects than the average sawlog, and for this reason many veneer mills have occasionally experienced difficulty in securing quality logs for their operations. Because the Menominee Forest was one of the largest and finest stands of sawtimber in Wisconsin, it contained a high percentage of logs suitable for veneer. The CFI of 1963 provided evidence of the Menominee Forest's high quality. Of these trees graded for quality, 51.2 percent were grade 1, the highest quality sawlog. A January 1952 report by Mr. Winner (the 1952 inventory) estimated that 43.2 percent of the total hardwood volume of the forest was grade 1, and 17.7 percent grade 2. By comparing the grade distribution on the Menominee Forest with the Nicolet National Forest immediately to the north, one is able to appreciate more fully its high quality. On the Nicolet Forest, only 19 percent of the hardwood volume of the forest is in grade 1 trees. (Banzhaf Report at 45-46).

59. Mr. Winner was quoted in a February 1959 letter as estimating that 4.2 MMBF of veneer could be expected from an annual cut of 30 MMBF. (P. Ex. B-28 at 10). Yet during the period at issue, only 0.7 percent of the Menominee Forest's log production went to veneer. This was despite the fact that the [87] average stumpage price paid for veneer logs of all species based on BIA figures was \$100 per MBF, as compared to only \$24 for all species of sawlogs. Yellow birch, generally the most valuable species in the forest, brought an average veneer stumpage price of \$170 per MBF over that 10-year period, as compared to its sawlog value of only \$34. (Banzhaf Report at 46).

60. An important consideration in the decision of whether or not to produce veneer logs was the effect that



the loss of these prime logs would have on the overall quality of lumber produced from the sawmill balanced against the increased stumpage revenue from the veneer logs. Sawmill manager, Dickinson, studied this question and determined in 1954 that the benefits from a veneer producing mill would have outweighed the loss to the sawmill of the logs. (P. Ex. B-29). He visited some of the 17 veneer mills in the vicinity of the reservation and based his assumptions on actual market data. (P. Ex. B-30).

61. The veneer mill proposition came up at the earlier described Forest Management Conference held on the reservation in January 1951. In a memorandum to mill manager, Dickenson, from forest supervisor, Ridlington, dated March 27, 1951, Mr. Ridlington discussed the favorable attitude expressed at the conference toward the construction of a veneer mill:

It was the opinion of those attending the above mentioned conference, that the time is economically right for establishment of such a plant. This opinion arose from the awareness of the need for veneer in a time of national emergency [veneer was used in the production of military aircraft; P. Ex. B-31]. Too, such a program of diversification is particularly desirous from a sociological viewpoint. Such a project, physically possible and economically feasible, can contribute a share toward elevating the Reservation standard of living. (P. Ex. B-34 at 2).

62. Discussion of a veneer mill on the reservation came up again in 1954. The minutes of the Menominee Tribal Council of March 20 and March 27, 1954, provide detailed evidence of tribal support for the expansion of the Menominee mills to include a veneer mill. (P. Ex. B-36). A resolution authorizing \$750,988 for the expansion program was passed following debate by a vote of 87 to 9. (*Id.* at 107). In an April 12, 1954 letter reporting on this tribal council meeting, Menominee superin-



tendent James Arentson approved the expansion plan. He said:

[88] Expansion of the Mill's operation has been discussed at Menominee for many years and I feel that this is the time for action. I therefore recommend approval. (P. Ex. B-37).

63. The last available reference to the proposed veneer mill is contained in a memorandum dated December 27, 1954 from Percy E. Melis, Chief of the Branch of Forestry, to "Tribal Affairs":

In view of the subsequent enactment of the Menominee termination legislation, and recent unfavorable economic trends in the wood using industries, the Tribal representative and personnel of the Area Office and Menominee Agency should be asked whether they are in favor of going forward with the expansion program at this time. No action on this matter by the Central Office is appropriate on the basis of our present information. (P. Ex. B-40).

64. Mr. Melis cites "unfavorable economic trends in the wood using industries" as a reason for holding expansion plans in abeyance. Yet mill manager, Dickenson, and the others who studied the feasibility of a veneer mill did so in the actual local market environment of a mill, and still were able to strongly recommend expansion.

65. Neither party has presented strong evidence explaining why the proposal for the veneer mill was abandoned. However, the Banzhaf Report concludes:

The only excuse appears to be that the BIA saw termination ahead and as apparently was the case with the sawmill, decided not to invest further in a reservation soon to pass from its control. (Banzhaf Report at 56).

*C. Defendant's Study of Menominee Forest Management*

66. Defendant's witnesses conceded that the Menominee Forest was overstocked during the period underlying this claim, and that the 20 MMBF limitation made adjustment of levels of growing [89] stock "physically impossible." (See, for example, finding 37 *supra*.) Nevertheless, in their Report on Forest Management, Messrs. Steigerwaldt and Carow assert that since no radical changes took place in the forest between 1951 and 1961, there is no basis upon which to ground plaintiffs' claim of mismanagement. (D. Ex. 101-R at 52-55). The report nowhere considers plaintiffs' claim that the defendant had an affirmative duty to seek amendment or removal of the harvest limitation in the face of its arbitrary effect on the economic health of the Menominee Forest.

67. The Steigerwaldt and Carow report concludes that defendant's "conservative management policies" of the period were justified because of the preliminary nature of the 1952 inventory, and the lack of evidence corroborating that inventory. (D. Ex. 101-R at 84-85). In addition, they conclude that since the Menominee Forest was managed under the same principles as other major Wisconsin forests, it could not have been mismanaged. (*Id.* at 85-95).

68. However, the comparison drawn by Steigerwaldt and Carow actually serves to confirm many of the shortcomings of defendant's management highlighted in the Banzhaf Report. For example, in a privately owned forest in Michigan and Wisconsin a minimum residual basal area of 66 square feet per acre was observed, beginning in 1934. (*Id.* at 94). The Eyre and Zillgitt study earlier cited recommended a level of 70 square feet. In contrast, the Menominee Forest level, as developed in the Banzhaf Report (table XIV), was 89 square feet, indicating again the extent of overstocking that prevailed in the forest.

69. Likewise, a comparison of the Menominee Forest with four national forests in Wisconsin and Michigan shows that Menominee lagged several years behind the others in commencing the practice of utilizing aerial surveys. (*Id.* at 88). These national forests had begun aerial surveys as early as 1947, and as late as 1953 (although in one forest the survey was not completed until 1957). Aerial surveys were not conducted at Menominee until 1955, and they were not interpreted and utilized until 1957.

*D. Other Evidence on Defendant's Management of the Menominee Forest*

70. Rebuttal testimony on behalf of plaintiffs was presented by Dr. Duncan Harkin. Dr. Harkin was, at the time he [90] testified, an Associate Professor of Agricultural Economics and Forestry at the University of Wisconsin and Director of the Center for Natural Resources Policy Studies, as well as an extension specialist in Natural Resources, Economics and Land Use Planning for the Cooperative State-Federal Extension Service. He had joined the faculty of the University of Wisconsin in 1963 as an instructor while working on a Ph.D. thesis, the subject of which was the economic development of Menominee County, Wisconsin. In addition to academic work at the University of Wisconsin, and previously at the University of Illinois, teaching forest management, mensuration, forest fire control and use, Dr. Harkin had 5 years experience as a research and management forester for the West Virginia Pulp and Paper Company in South Carolina. (Tr. 674-76).

71. Dr. Harkin had conducted a special study of the problems of Menominee County in connection with his doctoral thesis. He studied the Menominee Forest, and particularly the 1961 Forest Plan under which it was then operating, to determine if the forest resources were being put to optimum use. In his later capacity as an ex-

tension specialist in land use planning, Dr. Harkin had continued his interest in the economic problems of the Menominee people. Dr. Harkin did not testify as plaintiffs' paid expert. His participation in the case was as an employee of the Federal Government, the Federal Extension Service, and all his expenses were paid by the Service. (Tr. 677-78).

72. Dr. Harkins's aforementioned thesis had concluded that the Menominee Forest was overstocked as of the date of its publication (August 1966), and that it would remain overstocked unless the 1961 Management Plan was radically amended. (P. Ex. B-42 at 187, 191-93). Yet it should be noted that the annual harvest adopted in that 1961 plan was 30.3 MMBF, representing an increase of 10.3 MMBF over the original 1890 limitation of 20 MMBF.

73. In connection with the management of the Menominee Forest, Dr. Harkin testified that from data available to him, he believed the Government foresters had sufficient information in 1951 or 1952 to determine that the forest was in fact overstocked and that an annual cut greater than 20 MMBF was required. (Tr. 679-80). He further testified that if in fact in 1948, or subsequently, data sufficient to project a forest inventory was not available, then "a crash program was in order to make that data available." (Tr. 681). And, if for some reason new inventory methods such as aerial surveys were unavailable, other traditional methods, such as strip cruising or plot line cruising, could have been employed. (*Id.*).

[91] 74. Dr. Harkin testified that he agreed with both the Banzhaf study and with Mr. Rickard regarding the mismanagement of the forest, except that both were somewhat conservative in their approach. He also agreed with the Rickard approach to damages. (Tr. 685-88, 707).

75. In a letter-report to George Banzhaf dated October 13, 1971, former Menominee mill manager, R. W. Dicksonson, recounted some of the problems he experienced during his tenure at the Menominee mill from 1947-1959. After enumerating his frustrated attempts to improve and expand Menominee Industries, for example, his fruitless support of the veneer mill, boiler plant and turbine generator, his opposition to large cash stumpage payments to the tribe that depleted the capital reserve account, and the disproportionate hemlock harvest, he concluded:

It is my opinion that the utter indifference by the Bureau of Indian Affairs following the judgment in the Mismanagement Claim in 1951 up to Termination resulted in failure to make necessary and required improvements and implementing programs, which caused losses to the Menominees of ready profits. (P. Ex. B-44 at 3).

### III. DAMAGES

#### A. *The Banzhaf Study*

76. The Banzhaf study calculated damages by comparing the actual annual harvest between 1952 and 1960 with a constructed "realistic annual harvest." The tables summarizing the Banzhaf calculation follow this finding. No damages were assessed in 1951, because of the lack of inventory data until 1952, the unavoidable lag time in implementing the recommendations of the January 1951 Forest Management Conference, and the complication of extra hemlock harvest in 1951 due to blow-down and disease. (Banzhaf Report at 58).

TABLE I  
VOLUMES CUT UNDER CONTRACT <sup>1</sup>  
ALL PRODUCTS COMBINED

Thousand Board Feet

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average	Percent of Average Cut
White pine	3,455	3,056	2,687	3,756	4,068	4,733	5,824	3,339	2,062	4,159	3,714	18.2
Red pine	237	270	656	535	755	588	633	506	401	260	484	2.4
Hemlock	11,849	7,868	6,347	7,184	6,366	6,262	4,728	6,591	5,969	6,573	6,974	34.3
Yellow birch	934	1,026	886	1,085	1,174	885	703	1,070	811	784	936	4.6
White birch	23	27	18	14	16	25	32	11	8	14	19	.1
Red oak	324	319	500	466	402	575	680	670	322	351	461	2.3
White oak	12	10	13	10	16	20	20	7	20	2	13	.1
Hard maple	3,268	2,425	3,607	2,862	3,444	3,308	4,364	4,412	2,917	4,301	3,491	17.1
Soft maple	45	135	156	192	112	167	108	50	45	83	109	.5
White ash	74	59	45	155	130	126	73	127	49	58	90	.4
Black ash	90	179	123	119	148	155	207	236	91	150	150	.7
Basswood	1,038	390	867	729	950	1,014	1,100	1,238	797	774	890	4.4
Rock elm	43	8	47	16	61	205	312	377	374	617	206	1.0
Soft elm	893	403	718	369	643	703	516	606	387	454	569	2.8
Beech	557	1,248	1,105	397	125	147	107	495	237	440	486	2.4
Spruce	7	36	15	59	91	27	24	21	9	73	36	.2
Balsam	1	3	1	10	6	17	4	3		43	9	.1
Cedar	232	314	288	764	288	122	367	494	173	117	316	1.5
Hickory	10	3	5	5	22	10	46	18	8	13	14	.1
Popple <sup>2</sup>	1,133	678	1,373	1,025	1,501	792	922	1,074	1,377	2,526	1,240	6.1
Jack pine	3	195	154	110	179	124	160	67	36	12	104	.5
Butternut	10	2	10	22	29	71	112	39	51	56	40	.2
Cherry	1	1	3	2	6	20	9	7	13	5	7	
Tamarack	1	3	4	4	4	7	4	1	1	6	4	
TOTALS	24,238	18,658	19,628	19,890	20,536	20,103	21,055	21,459	16,153	21,871	20,362	100.0

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.



TABLE II  
STUMPAGE RATE PER THOUSAND BOARD FEET <sup>1</sup>  
ALL PRODUCTS COMBINED  
Nearest Dollar

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average Rate
White pine	\$29.41	\$36.00	\$35.00	\$35.00	\$29.00	\$30.00	\$31.00	\$26.00	\$26.48	\$28.27	\$30.60
Red pine	26.28	31.00	25.00	23.00	23.00	30.00	25.00	26.00	26.22	27.83	25.83
Hemlock	14.66	16.00	16.00	16.00	16.00	18.00	19.00	18.00	17.04	16.73	16.50
Yellow birch	29.69	35.00	37.00	39.00	40.00	36.00	40.00	40.00	48.82	46.32	38.94
White birch	14.69	27.00	27.00	32.00	36.00	32.00	36.00	39.00	35.25	81.14	34.69
Red oak	28.82	25.00	25.00	26.00	29.00	27.00	30.00	35.00	32.96	32.56	29.25
White oak	29.25	26.00	25.00	26.00	29.00	27.00	30.00	34.00	30.65	31.70	28.57
Hard maple	22.99	25.00	26.00	25.00	25.00	24.00	28.00	28.00	22.38	32.04	26.72
Soft maple	23.97	19.00	25.00	26.00	24.00	20.00	23.00	24.00	22.89	34.55	24.38
White ash	17.18	22.00	23.00	25.00	27.00	26.00	30.00	32.00	31.43	34.78	26.87
Black ash	19.66	21.00	23.00	25.00	27.00	27.00	32.00	33.00	31.56	35.93	28.18
Basswood	39.39	37.00	37.00	39.00	40.00	34.00	37.00	38.00	39.29	41.21	38.13
Rock elm	23.41	20.00	25.00	25.00	24.00	28.00	26.00	28.00	27.71	28.97	27.60
Soft elm	24.77	28.00	27.00	27.00	31.00	30.00	31.00	32.00	33.17	33.07	29.34
Beech	16.32	15.00	15.00	15.00	16.00	17.00	14.00	16.00	13.81	15.90	15.34
Spruce	26.44	32.00	29.00	15.00	21.00	20.00	20.00	17.00	23.44	15.47	20.12
Balsam	27.00	24.00	29.00	7.00	16.00	9.00	8.00	12.00	22.91	12.07	11.75
Cedar	6.40	11.00	8.00	7.00	6.00	14.00	12.00	18.00	13.84	12.74	10.51
Hickory	22.70	20.00	25.00	25.00	24.00	25.00	26.00	28.00	28.38	28.97	25.85
Popple <sup>2</sup>	4.78	13.00	13.00	11.00	10.00	9.00	11.00	10.00	7.54	8.36	9.51
Jack pine	5.66	6.00	6.00	6.00	6.00	17.00	18.00	18.00	13.97	10.67	10.26
Butternut	34.00	36.00	37.00	41.00	40.00	35.00	59.00	62.00	72.18	69.11	54.49
Cherry	7.00	10.00	10.00	10.00	10.00	10.00	11.00	10.00	45.69	58.80	20.66
Tamarack	3.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	3.50	3.89
AVERAGE RATE	\$19.77	\$22.00	\$23.00	\$23.00	\$23.00	\$24.00	\$27.00	\$25.00	\$23.64	\$25.51	\$23.44

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.

**TABLE III**  
**VOLUMES CUT UNDER CONTRACT <sup>1</sup>**  
**SAWLOGS ONLY**  
 Thousand Board Feet

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average
White pine	3,036	2,991	2,670	3,693	4,018	4,676	5,772	3,320	2,045	4,132	3,635
Red pine	227	268	657	527	753	582	629	501	396	257	480
Hemlock	11,846	7,662	6,344	7,181	6,082	5,850	4,640	6,570	5,969	6,542	6,869
Yellow birch	882	1,006	867	1,065	1,134	844	671	1,056	741	739	901
White birch	12	21	16	10	16	25	31	11	8	9	16
Red oak	315	314	498	464	402	561	631	640	305	336	447
White oak	12	9	13	10	16	20	20	7	20	2	13
Hard maple	3,207	2,419	3,601	2,847	3,434	3,267	4,338	4,370	2,882	4,225	3,459
Soft maple	44	128	154	192	112	146	104	45	42	62	113
White ash	74	59	45	155	130	126	72	127	49	58	90
Black ash	78	173	122	119	148	133	195	230	87	142	143
Basswood	904	377	856	726	939	985	1,096	1,231	792	731	864
Rock elm	43	8	47	16	61	192	312	377	374	617	205
Soft elm	875	397	717	368	643	681	509	601	369	449	561
Beech	557	1,242	1,102	397	125	147	107	495	237	440	485
Spruce	7	36	15	28	76	22	17	12	9	19	24
Balsam	1	2	1	1	4	1					1
Cedar	12	52	35	38	12	31	46	72	82	36	42
Hickory	10	3	5	5	22	10	46	18	8	13	14
Popple <sup>2</sup>	42	394	833	442	606	269	393	350	287	606	422
Jack pine	1	195	154	105	179	124	160	67	36	6	103
Butternut	9	2	10	21	29	70	69	22	25	25	28
Cherry	1	1	3	2	6	20	9	7	12	4	7
Tamarack	1	3	4	4	4	5	4	1	1	1	3
<b>TOTALS</b>	<b>22,196</b>	<b>17,762</b>	<b>18,769</b>	<b>18,416</b>	<b>18,951</b>	<b>18,787</b>	<b>19,871</b>	<b>20,130</b>	<b>14,776</b>	<b>19,451</b>	<b>18,911</b>

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B5.

<sup>2</sup> Common name for the aspen species group.

TABLE IV  
STUMPAGE RATE PER THOUSAND BOARD FEET<sup>1</sup>  
SAWLOGS ONLY

Nearest Dollar

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average Rate
White pine	\$32.00	\$37.00	\$35.00	\$34.00	\$29.00	\$30.00	\$30.00	\$26.00	\$25.88	\$28.38	\$30.62
Red pine	27.00	31.00	25.00	23.00	23.00	30.00	25.00	26.00	26.31	27.88	25.87
Hemlock	15.00	16.00	16.00	16.00	16.00	19.00	18.00	18.00	17.04	16.78	16.57
Yellow birch	24.00	33.00	34.00	37.00	36.00	32.00	33.00	39.00	35.54	38.61	34.34
White birch	23.00	33.00	34.00	37.00	36.00	32.00	33.00	39.00	35.25	38.61	33.59
Red oak	28.00	25.00	25.00	26.00	29.00	27.00	30.00	34.00	31.24	21.70	28.85
White oak	29.00	25.00	25.00	26.00	29.00	27.00	30.00	34.00	30.65	31.70	28.50
Hard maple	22.00	25.00	26.00	25.00	25.00	24.00	28.00	28.00	27.68	31.04	26.45
Soft maple	24.00	19.00	25.00	26.00	24.00	22.00	23.00	27.00	24.21	25.24	23.73
White ash	18.00	22.00	23.00	25.00	27.00	26.00	29.00	32.00	31.43	34.78	26.86
Black ash	17.00	22.00	23.00	25.00	27.00	26.00	29.00	32.00	31.21	34.78	27.36
Basswood	36.00	36.00	37.00	39.00	40.00	35.00	37.00	38.00	39.28	38.95	37.63
Rock elm	23.00	20.00	25.00	25.00	24.00	25.00	26.00	28.00	27.71	28.97	27.31
Soft elm	25.00	28.00	28.00	27.00	31.00	31.00	31.00	33.00	31.79	33.11	29.66
Beech	16.00	15.00	15.00	15.00	16.00	17.00	14.00	16.00	13.81	15.90	15.30
Spruce	26.00	32.00	29.00	25.00	24.00	22.00	23.00	20.00	23.44	25.41	25.32
Balsam	27.00	32.00	29.00	25.00	24.00	22.00	23.00	20.00	22.91	25.41	26.30
Cedar	11.00	19.00	17.00	17.00	16.00	19.00	20.00	15.00	14.74	16.75	16.72
Hickory	23.00	20.00	25.00	25.00	24.00	25.00	26.00	28.00	28.38	28.97	25.87
Popple <sup>2</sup>	12.00	18.00	18.00	18.00	19.00	17.00	20.00	20.00	18.55	19.51	18.75
Jack pine	15.00	6.00	6.00	6.00	6.00	17.00	18.00	18.00	13.97	14.74	10.31
Butternut	33.00	36.00	37.00	39.00	40.00	35.00	37.00	38.00	38.56	38.95	37.22
Cherry	6.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	33.83	33.81	16.10
Tamarack	3.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	4.00	3.96
AVERAGE RATE	\$20.00	\$23.00	\$23.00	\$24.00	\$24.00	\$25.00	\$27.00	\$25.00	\$23.83	\$25.51	\$24.10

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.

[96]

TABLE V

VOLUMES CUT UNDER CONTRACT <sup>1</sup>

VENEER LOGS ONLY

Thousand Board Feet

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average
White pine	49		8	51	47	6	43	7	17	2	23.0
Red pine							4	3			.6
Yellow birch	52	14	17	19	40	27	30	11	68	42	32.0
White birch				4			1			4	.9
Red oak	9	1	1	2			13	27	14	10	7.7
White oak		1									.1
Hard maple	56	6	6	15	10	12	22	35	32	69	26.3
Soft maple	1	1								16	1.8
White ash							1				.1
Black ash	7					8	10	3	2	5	3.5
Basswood	123	13	11	3	11				2	36	19.9
Rock elm						9					.9
Soft elm	13			1			4		15		3.3
Beech			2								.2
Popple <sup>2</sup>				3			10		8	33	5.4
Butternut	1			1		1	43	17	26	31	12.0
Cherry									1	1	.2
TOTALS	311	36	45	99	108	63	181	103	185	249	137.9

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.<sup>2</sup> Common name for the aspen species group.

[97] **TABLE VI**  
**STUMPAGE RATE PER THOUSAND BOARD FEET <sup>1</sup>**  
**VENEER LOGS ONLY**  
 Nearest Dollar

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average Rate
White pine	\$ 13.00		\$ 79.00	\$ 88.00	\$ 94.00	\$ 94.00	\$ 94.00	\$ 94.00	\$ 98.82	\$ 98.75	\$ 75.25
Red pine	133.00	\$163.00	171.00	171.00	171.00	174.00	191.00	66.00	194.81	185.83	174.37
Yellow birch				171.00			191.00			185.83	
White birch				53.00			75.00		76.50	74.75	
Red oak	43.00	41.00	53.00								
White oak		41.00									
Hard maple	61.00	84.00	70.00	74.00	70.00	71.00	96.00	96.00	93.22	95.79	83.90
Soft maple	37.00	54.00								79.31	
White ash							84.00				
Black ash	37.00					69.00	84.00	84.00	74.00	84.00	
Basswood	64.00	70.00	79.00	79.00	79.00				94.50	93.75	
Rock elm						112.00					
Soft elm	30.00			53.00			75.00		73.07		
Beech			60.00								
Popple <sup>2</sup>				39.00			24.00		24.25	24.38	
Butternut	79.00			88.00		84.00	94.00	94.00	104.50	93.75	
Cherry									188.00	140.00	
AVERAGE RATE	\$64.00	\$106.00	\$119.00	\$102.00	\$119.00	\$123.00	\$104.00	\$100.00	\$127.10	\$100.43	\$100.00

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.

TABLE VII  
VOLUMES CUT UNDER CONTRACT <sup>1</sup>  
PULPWOOD, POSTS, MISCELLANEOUS PRODUCTS

Cords

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	Average
White pine	754	126	19	19	6	101	18	24		50	111.7
Red pine	7	4		10	4	12				1	3.8
Hemlock	6	412	6	7	569	824	176	42		62	210.4
Yellow birch		19	4	4		41	6	10	5	10	9.9
White birch	33	19	4							2	5.8
Red oak		13	3			41	109	10	8	16	20.0
Hard maple	14					82	13	20	10	20	15.9
Soft maple		19	4			61	11	15	8	15	13.3
Black ash	15	19	1			41	6	10	5	10	10.7
Basswood	33					82	13	20	10	20	17.8
Soft elm	14	19	4			61	10	15	8	15	14.6
Beech		19	4								2.3
Spruce				63	30	10	14	17		108	24.2
Balsam		2		18	5	31	8	7		43	11.4
Cedar	432	524	506	1,452	552	182	642	844	182	162	547.8
Popple <sup>2</sup>	3,270	619	1,619		1,738	1,362	1,542	2,172	3,247	5,662	2123.1
Jack pine	6			10						12	2.8
TOTALS	4,584	1,814	2,174	1,583	2,904	2,904	2,568	3,206	3,483	6,208	3142.8

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.



TABLE VIII  
STUMPAGE RATE PER CORD <sup>1</sup>  
PULPWOOD, POSTS, MISCELLANEOUS PRODUCTS  
Nearest Dollar

Species	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960
White pine	\$3.00	\$ 4.00	\$3.00	\$3.00	\$ 3.00	\$ 3.00	\$3.00	\$3.00		\$3.00
Red pine	3.00	12.00		3.00	11.00	15.00				3.00
Hemlock	3.00	4.00	3.00	3.00	3.00	3.00	3.00	3.00		3.00
Yellow birch		3.00	3.00	3.00		2.00	2.00	2.00	\$2.00	3.00
White birch	2.00	3.00	3.00							3.00
Red oak		3.00	3.00			2.00	2.00	2.00	2.00	3.00
Hard maple	2.00					2.00	2.00	2.00	3.00	3.00
Soft maple		3.00	3.00			2.00	2.00	2.00	2.00	3.00
Black ash	2.00	3.00	3.00			2.00	2.00	2.00	2.00	3.00
Basswood	2.00					2.00	2.00	2.00	3.00	3.00
Soft elm	2.00	3.00	3.00			2.00	2.00	2.00	2.00	3.00
Beech		3.00	3.00			2.00	2.00	2.00		
Spruce				3.00	3.00	6.00	6.00	6.00		6.00
Balsam		3.00		3.00	3.00	4.00	4.00	6.00		6.00
Cedar	3.00	4.00	1.00	3.00	2.00	6.00	5.00	9.00	3.00	5.00
Popple <sup>2</sup>	2.00	3.00	2.00		2.00	2.00	2.00	2.00	2.00	2.00
Jack pine	2.00			2.00						3.00

<sup>1</sup> Taken from annual forestry reports prepared by Menominee Agents. See Exhibit B-5.

<sup>2</sup> Common name for the aspen species group.

TABLE IX  
ACTUAL ANNUAL HARVEST BY PRODUCT

[100]

Year	Total <sup>1</sup> Volume MBF	Sawtimber <sup>2</sup> Volume MBF	Percent Sawtimber	Veneer <sup>3</sup> Volume MBF	Percent Veneer	Cordwood <sup>4</sup> Volume MBF	Percent Cordwood	Piece <sup>5</sup> Volume MBF	Percent Pieces
1951	24,238	22,196	91.6	311	1.3	1,509	6.2	222	.9
1952	18,658	17,762	95.2	36	.2	596	3.2	264	1.4
1953	19,628	18,769	95.6	45	.2	562	2.9	252	1.3
1954	19,890	18,416	92.6	99	.5	642	3.2	733	3.7
1955	20,536	18,951	92.3	108	.5	1,199	5.8	278	1.4
1956	20,103	18,787	93.5	63	.3	1,150	5.7	103	.5
1957	21,055	19,871	94.4	181	.9	682	3.2	321	1.5
1958	21,459	20,130	93.8	103	.5	802	3.7	424	2.0
1959	16,158	14,776	91.4	185	1.2	1,101	6.8	96	.6
1960	21,871	19,451	90.0	249	1.1	2,082	9.5	89	.4
TOTAL	203,596	189,109	92.9	1,380	.7	10,325	5.0	2,782	1.4

<sup>1</sup> See Exhibit B-5

<sup>2</sup> " "

<sup>3</sup> " "

<sup>4</sup> " "

<sup>5</sup> " "

TABLE X  
HARVEST OF HEMLOCK  
COMPARED TO ALL OTHER SPECIES<sup>1</sup>

1944 - 1948

Board Feet

Year	Hemlock		Other Species	
	Volume Harvested	Percent	Volume Harvested	Percent
1944	7,932,650	39.3	12,248,120	60.7
1945	8,138,320	40.8	11,821,820	59.2
1946	8,732,840	42.1	12,002,620	57.9
1947	8,475,930	40.8	12,299,150	59.2
1948	6,246,050	35.6	11,310,030	64.4
TOTAL	39,525,790	39.8	59,681,740	60.2
5-Year Average	7,905,158	39.8	11,936,348	60.2

<sup>1</sup> The author of the Table from which these data are taken is unknown, although it most likely was prepared by the BIA staff on the Reservation to compare hemlock harvest before and during the species hemlock salvage cut of 5MM board feet. It was dated March 14, 1949. See Exhibit B-43.

[102] **TABLE XI**  
**VOLUME BY SPECIES AND GRADE ON GRADED TREES ON 132,000 ACRES<sup>1</sup>**  
 1963 CFI

Species	Grade 1			Grade 2			Grade 3			Total
	Volume MBF	Percent	Volume	Percent	Volume	Percent	Volume	Percent	Volume Graded	
Hard maple	96,183.4	43.2	71,391.0	32.1	55,096.9	24.7	222,671.3			
Soft maple	2,291.5	16.8	4,814.0	35.3	6,543.4	47.9	13,648.9			
Yellow birch	37,181.6	37.8	33,263.8	33.8	27,858.2	28.4	98,303.6			
Basswood	57,822.0	68.3	14,370.2	16.9	12,522.6	14.8	84,714.8			
Soft elm	54,622.3	78.9	10,922.4	15.8	3,691.0	5.3	69,235.7			
Rock elm	23,769.2	78.2	4,179.6	13.7	2,465.5	8.1	30,414.3			
Red oak	37,843.2	64.9	11,277.1	19.4	9,146.0	15.7	58,266.3			
Scrub oak			708.8	6.1	10,881.8	93.9	11,590.6			
Beech	4,327.6	21.0	4,662.0	22.7	11,577.9	56.3	20,567.5			
Black ash	2,409.5	28.0	4,008.8	46.5	2,200.7	25.5	8,619.0			
White ash	2,919.5	68.9	477.7	11.3	840.0	19.8	4,237.2			
Butternut			89.5	45.8	105.8	54.2	195.3			
Hickory	178.6	24.3	156.4	21.2	401.1	54.5	736.1			
Black cherry	245.0	16.5	876.5	58.8	368.0	24.7	1,489.5			
<b>TOTAL</b>	<b>319,793.4</b>	<b>51.2</b>	<b>161,197.8</b>	<b>25.8</b>	<b>143,698.9</b>	<b>23.0</b>	<b>624,690.1</b>			

<sup>1</sup> Taken from the 1963 Continuous Forest Inventory printouts of Menominee Enterprises, Incorporated.

[103] **TABLE XII**  
**1952 FOREST VOLUME**  
 Thousand Board Feet

Species	Volume <sup>1</sup>	Volume in <sup>2</sup> 10 Inch Dia. Class	Total Merchantable Volume <sup>3</sup> Minus an Additional 10 Percent Safety Factor
Hemlock	329,385	12,355	285,327
White pine	262,038	3,029	233,108
Yellow birch	74,693	3,514	64,061
Beech	34,285	2,700	28,427
Hard maple	197,141	7,507	170,671
Basswood	72,244	2,404	62,856
Elm	88,162	2,945	76,695
Red oak	41,632	3,005	34,764
Aspen	26,939	5,433	19,355
Red pine	29,388	231	26,241
Misc. hardwoods	46,530	6,004	36,474
Misc. conifers	22,041	2,422	17,657
<b>TOTAL</b>	<b>1,224,478</b>	<b>51,549</b>	<b>1,055,636</b>

<sup>1</sup> Taken from *A Plan for Continuous Forest Control on the Menominee Indian Reservation (1954)*, page 58. See Exhibit B-6.

<sup>2</sup> Volume in trees less than 12 inches diameter is of questionable merchantability, and therefore deleted.

<sup>3</sup> The "safety factor" reflects the fact that the statistical accuracy of the data was approximately plus or minus 10%.

[104]

TABLE XIII

EYRE AND ZILLGITT'S DESIRABLE STOCKING  
PER ACRE FOR GOOD CONTINUOUS GROWTH

Diameter at Breast Height In Inches	Desirable Stand After Cutting	
	Trees	Basal Area
	Number of Stems	Square Feet
2	118	2.6
3	53	2.6
4	31	2.7
5	21	2.9
6	15	2.9
7	12	3.2
8	9	3.1
9	8	3.5
10	7	3.8
11	6	4.0
12	5	3.9
13	5	4.6
14	5	5.3
15	4	4.9
16	4	5.6
17	3	4.7
18	3	5.3
19	3	5.9
20	2	4.4
21	2	4.8
22	2	5.3
23	1	2.9
24	1	3.1
TOTAL	320	92.0



TABLE XIV

[105]

COMPARISON BETWEEN MENOMINEE  
FOREST AND SUGGESTED "NORMAL"  
OF EYRE AND ZILLGITT

Diameter Class	Trees Per Acre		Basal Area Per Acre Square Feet	
	Menominee	Suggested "Normal"	Menominee	Suggested "Normal"
10	15.6	15	8.5	7.3
12	12.3	11	9.7	7.9
14	9.6	10	10.3	9.9
16	7.5	8	10.5	10.5
18	5.8	6	10.2	10.0
20	4.3	5	9.4	10.3
22	3.1	4	8.2	10.1
24	2.1	2	6.6	6.0
26	1.4		5.2	
28	.8		3.4	
30	.5		2.5	
32	.3		1.7	
34	.1		.6	
36	.1		.7	
38	.1		.8	
40	.05		.9	
TOTALS	63.65	61	89.2	72.0

[106]

TABLE XV  
ANNUAL GROWTH  
Thousand Board Feet

Species	1952 Volume <sup>1</sup>	2% Growth
Hemlock	285,327	5,706.5
White pine	233,108	4,662.2
Yellow birch	64,061	1,281.2
Beech	28,427	568.5
Hard maple	170,671	3,413.4
Basswood	62,856	1,257.1
Elm	76,695	1,533.9
Red oak	34,764	695.3
Aspen	19,355	387.1
Red pine	26,241	524.8
Misc. hardwoods	36,474	729.5
Misc. conifers	17,657	353.1
		<hr/> 21,112.6

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<sup>1</sup> See Table XII

[107]

TABLE XVI

REALISTIC ANNUAL LIQUIDATION  
HARVEST OF EXCESSIVE STOCKING <sup>1</sup>

<u>Species</u>	<u>Volume MBF</u>
Hemlock	1,846.2
White pine	1,451.5
Yellow birch	378.6
Beech	132.8
Hard maple	1,321.2
Basswood	440.7
Elm	582.2
Red oak	99.6
Aspen	65.5
Red pine	14.0
Misc. hardwoods	160.1
Misc. conifers	92.2
	<hr/> 6,584.6

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<sup>1</sup> Volumes are adapted from *A Plan for Continuous Forest Control of Menominee Enterprises Incorporated Lands* (1961), recommended stocking levels found on pages I-1 through I-26. Data are applied to 1952 Menominee Forest volumes as found in Table XII.

[108]

TABLE XVII

COMPONENTS OF REALISTIC  
ANNUAL HARVEST

Thousand Board Feet

Species	Annual Growth <sup>1</sup>	Annual Liquidation <sup>2</sup>	Total
	Available for Harvest	of Excessive Stocking	
Hemlock	5,706.5	1,846.2	7,552.7
White pine	4,662.2	1,451.5	6,113.7
Yellow birch	1,281.2	378.6	1,659.8
Beech	568.5	132.8	701.3
Hard maple	3,413.4	1,321.2	4,734.6
Basswood	1,257.1	440.7	1,697.8
Elm	1,533.9	582.2	2,116.1
Red oak	695.3	99.6	794.9
Aspen	387.1	65.5	452.6
Red pine	524.8	14.0	538.8
Misc. hardwood	729.5	160.1	889.6
Misc. conifers	353.1	92.2	445.3
Total	21,112.6	6,584.6	27,697.2

<sup>1</sup> See Table XII

<sup>2</sup> See Table XVI

[109] **TABLE XVIII**  
**REALISTIC ANNUAL HARVEST OF SAWLOGS AND RECEIPTS<sup>1</sup>**

Nearest Dollar

Species	Annual Harvest Volume MBF	1952	1953	1954	1955	1956	1957	1958	1959	1960	Total
Hemlock	7,552.7	\$120,843	\$120,843	\$120,843	\$120,843	\$143,501	\$135,949	\$135,949	\$128,698	\$126,734	
White pine	5,773.3	213,612	202,066	196,292	167,426	173,199	173,199	150,106	149,413	163,846	
Yellow birch	1,205.8	39,791	40,997	44,615	43,409	38,586	39,791	47,026	42,854	46,556	
Beech	701.3	10,519	10,519	10,519	11,221	11,922	9,818	11,221	9,685	11,151	
Hard maple	4,365.8	199,145	113,511	109,145	109,145	104,779	122,242	122,242	120,845	135,514	
Basswood	1,414.2	50,911	52,325	55,154	56,568	49,497	52,325	53,740	55,550	55,083	
Elm	2,073.5	57,726	57,664	60,840	62,184	61,541	60,318	64,424	65,917	63,947	
Red oak	695.7	17,393	17,393	18,088	20,175	18,784	20,871	23,654	21,734	22,054	
Aspen	381.8	6,872	6,872	6,872	7,254	7,254	7,636	7,636	7,082	7,449	
Red pine	538.8	16,703	13,470	12,392	12,392	16,164	13,470	14,009	14,176	15,022	
Misc. Hdwd.	549.0	11,913	13,549	14,351	14,878	14,159	15,679	17,299	16,981	18,188	
Misc. Conifers	445.3	5,232	4,257	5,103	5,183	7,842	8,251	7,410	6,702	8,461	
<b>TOTALS</b>	<b>25,697.2</b>	<b>\$660,660</b>	<b>\$653,466</b>	<b>\$654,314</b>	<b>\$630,678</b>	<b>\$647,228</b>	<b>\$659,549</b>	<b>\$654,716</b>	<b>\$639,637</b>	<b>\$674,005</b>	<b>\$5,874,253</b>

<sup>1</sup> See Table IV for origin of stumpage rates applied to harvest volumes.

TABLE XIX  
AVERAGE ANNUAL STUMPAGE PRICES FOR VENEER LOGS<sup>1</sup>

[110]

Species	1952	1953	1954	1955	1956	1957	1958	1959	1960
White pine	\$ 46.00	\$ 79.00	\$ 88.00	\$ 94.00	\$ 94.00	\$ 94.00	\$ 94.00	\$ 98.82	\$ 93.75
Yellow birch	163.00	171.00	171.00	171.00	174.00	191.00	193.00	194.81	185.83
Red oak	41.00	53.00	53.00	53.00	53.00	75.00	75.00	76.50	74.75
Hard maple	84.00	70.00	74.00	70.00	71.00	96.00	96.00	93.22	95.79
Baswood	70.00	79.00	79.00	79.00	79.00	93.75	93.75	94.50	93.75
Soft elm	35.00	45.00	53.00	55.00	65.00	75.00	73.07	73.07	73.07
Aspen	20.00	24.00	39.00	24.00	24.00	24.00	24.00	24.25	24.38
Butternut	80.00	80.00	88.00	84.00	84.00	94.00	94.00	104.50	93.75
Miscellaneous	41.00	53.00	53.00	53.00	53.00	75.00	75.00	76.50	74.75

<sup>1</sup> Based on annual forestry reports prepared by Menominee Agency. Because sales were not made on several species each year, some stumpage rates for some years were estimated. See Exhibit B-5



[111] **TABLE XX**  
**REALISTIC HARVEST VOLUMES AND RECEIPTS FROM VENEER LOGS<sup>1</sup>**

Species	Nearest Dollar										
	Annual Harvest Volume (MBF)	1952	1953	1954	1955	1956	1957	1958	1959	1960	Total
White pine	340.4	\$ 15,658	\$ 26,891	\$ 29,955	\$ 31,997	\$ 31,997	\$ 31,997	\$ 31,997	\$ 33,638	\$ 31,912	
Yellow birch	454.0	74,002	77,634	77,634	77,634	78,996	86,714	87,622	88,443	84,364	
Red oak	99.2	4,067	5,257	5,257	5,257	5,257	7,440	7,440	7,588	7,415	
Hard maple	368.6	30,979	25,816	27,291	25,816	26,184	35,404	35,404	34,379	35,327	
Basswood	283.6	19,852	22,404	22,404	22,404	22,404	26,587	26,587	26,800	26,587	
Soft elm	42.6	1,491	1,917	2,257	2,343	2,769	3,195	3,112	3,112	3,112	
Popple <sup>2</sup>	70.8	1,416	1,699	2,761	1,699	1,699	1,699	1,699	1,716	1,726	
Butternut	50.0	4,000	4,000	4,400	4,200	4,200	4,700	4,700	5,200	4,687	
Miscellaneous	290.6	11,914	15,401	15,401	15,401	15,401	21,795	21,795	22,230	21,722	
<b>TOTALS</b>	<b>2,000.0</b>	<b>\$163,379</b>	<b>\$181,019</b>	<b>\$187,360</b>	<b>\$186,751</b>	<b>\$188,907</b>	<b>\$219,531</b>	<b>\$220,356</b>	<b>\$223,106</b>	<b>\$216,854</b>	<b>\$1,787,263</b>

<sup>1</sup> See Table VI for annual stumpage rates by species.

<sup>2</sup> Based on average ten year harvest volumes taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5

[112]

TABLE XXI

ANNUAL HARVEST OF MISCELLANEOUS PRODUCTS  
AND RECEIPTS EXCLUDING ASPEN

Year	Volume MBF <sup>1</sup>	Average Rate Per MBF	Receipts
1952	576	8.84	\$5,091.84
1953	274	3.25	890.50
1954	795	7.11	5,652.45
1955	582	5.58	3,247.56
1956	730	6.93	5,058.90
1957	484	9.31	4,506.04
1958	503	16.21	8,153.63
1959	115	11.97	1,376.55
1960	284	9.50	2,698.00

<sup>1</sup> Volumes and rates taken directly from annual forestry reports prepared by the Menominee Agency.

[118]

TABLE XXII

REALISTIC ANNUAL HARVEST  
OF ASPEN PULPWOOD

Year	Volume Cords	Equivalent <sup>1</sup> Volume in MBF	Rate <sup>2</sup> Per Cord	Total Receipts
1951	10,000	5,000	\$2.00	\$20,000
1952	10,000	5,000	2.00	20,000
1953	10,000	5,000	2.00	20,000
1954	10,000	5,000	2.00	20,000
1955	10,000	5,000	2.00	20,000
1956	10,000	5,000	2.00	20,000
1957	10,000	5,000	2.00	20,000
1958	10,000	5,000	2.00	20,000
1959	10,000	5,000	2.00	20,000
1960	10,000	5,000	2.00	20,000

<sup>1</sup> One MBF is the equivalent of 2 cords.

<sup>2</sup> Conservative rate based on open market rate on Nicolet National Forest and rate received on Menominee Forest. See Exhibit

TABLE XXIII  
RECEIPTS FROM REALISTIC ANNUAL HARVEST  
COMPARED WITH ACTUAL ANNUAL HARVEST

Year	Sawlogs <sup>1</sup>	Veneer Logs <sup>2</sup>	Miscellaneous Products <sup>3</sup>	Aspen Pulpwood <sup>4</sup>	Receipts	Actual Receipts Received <sup>5</sup>	Loss Incurred	Total Damage <sup>6</sup>
1952	\$660,660	\$166,379	5,092	\$20,000	\$849,131	\$415,227	\$443,904	\$1,096,454
1953	653,466	181,019	891	20,000	835,376	453,636	401,740	966,836
1954	654,314	187,360	5,652	20,000	867,326	465,345	401,981	921,348
1955	630,678	186,751	3,248	20,000	840,677	477,383	363,294	793,024
1956	647,228	188,907	5,059	20,000	861,194	489,642	371,552	772,481
1957	659,549	219,531	4,506	20,000	903,586	558,564	345,022	683,119
1958	654,716	220,356	8,154	20,000	903,226	532,700	370,526	698,682
1959	639,637	223,106	1,377	20,000	884,120	381,943	502,177	901,840
1960	674,006	216,854	2,698	20,000	913,557	532,528	381,029	651,689
								\$7,485,423

<sup>1</sup> Table XVIII<sup>2</sup> Table XX<sup>3</sup> Table XXI<sup>4</sup> Table XXII<sup>5</sup> Taken from annual forestry reports prepared by Menominee Agency. See Exhibit B-5<sup>6</sup> Total damages resulting from Government's management of the Menominee Forest.

[115] 77. The "realistic annual harvest" is composed of two elements, namely, the annual growth estimated at 2 percent, and the annual liquidation of excess inventory. The annual growth figure of 2 percent is supported by the 1961 Management Plan, which found the sawlog growth rate to be 2.19 percent (P. Ex. B-12 at 1), and it is, furthermore, consistent with growth rates in other nearby forests. (Banzhaf Report at 33). The volume of annual growth available for harvest is then computed at 2 percent times the total inventory per species, also derived from defendant's 1961 Management Plan (Banzhaf Report, tables XII, XVI and XVII). The total harvestable annual growth is thus 21.1 MMBF.

78. The Banzhafs used data provided by the 1961 Management Plan for this and other calculations for two reasons. First, the data provided in 1961 were based on the same forest inventory as the 1952 data (but with an updated remeasurement). Because the forest was operated on a sustained yield basis, the inventory should have been quite similar in 1960 and 1952. However, as a safety factor (on the conservative side), the Banzhafs reduced the 1960 volumes by 10 percent. Second, the author of the 1961 plan, Mr. Winner, an employee of the Government, was intimately familiar with the forest and was known to make conservative estimates of total forest volume from the raw inventory data available.

79. Excess volume is determined by subtracting the recommended stocking levels in the 1961 Management Plan (in turn adopted, with some adjustments, from the Eyre and Zillgitt study) (P. Ex. B-12 at I-1 to I-26), from the actual inventory levels reported in the 1961 plan (Banzhaf table XVII). Distributed over three 15-year cutting cycles, the annual harvest of excess volume amounts to 6.58 MMBF per year. The total realistic annual harvest is thus 27.697 MMBF, and this is based on conservative figures.

80. The total realistic harvest is then distributed among the species actually harvested according to their proportion of the total harvest. Total receipts for sawlogs, veneer logs, aspen pulpwood and miscellaneous products are then calculated separately (tables XVIII, XX-XXII *supra*), based on stumpage values calculated by defendant from the selling prices of rough lumber. (P. Ex. B-5). These subtotals are summarized and totaled in a final table, indicating a total loss incurred of \$3,571,225.

81. The Banzhaf computations were described at trial by plaintiffs' expert Wesley Rickard as "superbly conservative." (Tr. 440). Dr. Harkin also agreed with this characterization of the Banzhaf computations. (Tr. 685, 687-88).

[116] 82. The Banzhafs then calculated what their report terms "total damages," by adding 5 percent per year to the loss incurred, representing "the use the Menominees could have made of the losses they incurred." (*Id.* at 60). This brings the total damages to \$7,485,423.

83. Defendant objects to plaintiffs' addition of 5 percent per year to the total damages, calling it "an improper claim for compound interest." Defendant similarly objects to Mr. Rickard's inclusion, *infra*, of an additional 5 percent or 10 percent per year on damages.

### *B. The Rickard Study*

84. Mr. Rickard's study measures the loss to the tribe for the period 1951-1961 by subtracting the actual annual cut from the "potential annual cut." The tables outlining Mr. Rickard's method follow this finding. As in the Banzhaf study, the potential cut is the sum of the annual growth of 1.93 percent, and excess inventory. Mr. Rickard arrived at his annual growth figure by adding the percent of total forest volume represented by each annual harvest (1.61 percent of the 1952 inventory) and one-third of the annual inventory increase between 1914 and



1952 (.32 percent). The annual inventory increase is discounted by two-thirds because of the change in utilization standards between the 1914 and 1952 inventories (Tr. 428-29). The resultant growth rate of 1.93 percent times the total 1952 inventory of 1,224 MMBF yields 23.6 MMBF annual growth available for harvest.

TABLE A

## VALUE LOST THROUGH MISMANAGEMENT OF MENOMINEE FOREST

F.Y. 1952 through April 1961

Potential Annual Cut	31.2 MMBF				
Actual Annual Cut	19.9 MMBF				(\$7.77) utilization increment <sup>1</sup>
	11.3 MMBF				(\$39.31) full utilization <sup>2</sup>
Annual Loss Value	.....				\$598,826 for 9.83 years = \$5,886,460
F.Y. 1952-1961	F.Y. 1962-1971				Annual Loss
Value of 1/yr/9.83 yr	x Value of 1 for 10.58 yrs				Capitalization
20% (no tax) 25.082	x 10% (20% before tax) 2.744	=			Factor
10% (no tax) 15.536	x 5% (10% before tax) 1.676	=			Full Value Lost

<sup>1</sup> Value was lost due to poor utilization, \$7.77 is the average year's difference between net stumpage for the sawlog-veneer log-cordwood proportions that were produced, vs. the proportions that should have been produced. See *Value According to Log Use* for 1952, 1955, 1958, 1961.

<sup>2</sup> The average year's net stumpage for proper utilization. See *Value According to Log Use* for 1952, 1955, 1958, 1961.

<sup>3</sup> Recommended as realistic since industrial enterprises such as this characteristically face the need for funds that return benefits of 10% after taxes.

[118]

## TABLE A-1

## POTENTIAL HARVEST OF GROWTH

1952

1961

38 Years of History:

Average Cut, 19.8 MMBF

or 1.61% 1952 Inventory/Yr.

Inventory Increase, 375 MMBF, .96%/Yr.

x  $\frac{1}{3}$  or 0.32% 1952 Inventory/Yr.

1.93%

x 1224 MMBF (1952 Inventory)

23.6 MMBF

KNOWN IN 1952

[119]

TABLE A-2

## POTENTIAL HARVEST OF EXCESS INVENTORY

1952	1961
Hardwood and Hemlock Types :	MMBF
Inventory 1952	888
Recommended 1952	775
Excess 1952	113
Excess Per Year—15 Years	7.6

KNOWN IN 1952

[120]

TABLE A-3

REAL STUMPAGE VALUE OF FOREGONE HARVEST  
HARD MAPLE IN 1961 . . .

(EXAMPLE)	<u>\$/MBF</u>
Nicolet N.F. Comparison	28.75
Too Close to the Better Quality Menominee	
Apparent Menominee	31.04
Reverse Delaney's Formula	
Rough Lumber	100.00
Subtract Milling Cost	- 27.00
Log	73.00
Less Logging Cost	- 25.00
*True Stumpage	48.00
Correctly in Upper Range of Market	
Market Price Comparison	15.00 to 50.00
*Reduced \$3.75 for Administration when applied.	(\$44.25)

[121]

TABLE A-4

## REAL STUMPAGE VALUE OF FOREGONE HARVEST

Dollars/MBF

	Calculated from Actual Lumber & Log Values . . .					Market Stumpage
	All Reduced \$3.75 for Cost of Administration					
Log Use	1952	1955	1958	1961	1952-61	1962-71
Saw	34	33	31	33	32.84	30.35
Veneer	120	130	129	118	124.24	128.98
Other	9	5	9	5	6.82	4.95
Total (Weighted Average)	40	40	40	38	39.31	37.99



[122]

TABLE A-5

1952 STUMPAGE VALUE ACCORDING TO LOG USE  
(Reduced 3.75/M for Administration)

	Calculated Real Stumpage/M	Actual Harvest Proportions	BIA Potential Proportions
Sawtimber	\$ 34.31	.952	.617
Veneer	120.11	.002	.140
Other	9.12	.046	.243
Total Stumpage/MBF		\$33.32	\$40.20

1955 STUMPAGE VALUE ACCORDING TO LOG USE

Sawtimber	\$ 32.97	.922	.617
Veneer	129.64	.006	.140
Other	4.62	.072	.243
Total Stumpage/MBF		\$31.51	\$39.61

1958 STUMPAGE VALUE ACCORDING TO LOG USE

Sawtimber	\$ 31.45	.938	.617
Veneer	128.98	.005	.140
Other	9.01	.057	.243
Total Stumpage/MBF		\$30.66	\$39.65

1961 STUMPAGE VALUE ACCORDING TO LOG USE

Sawtimber	\$ 32.61	.898	.617
Veneer	118.23	.008	.140
Other	4.54	.094	.243
Total Stumpage/MBF		\$30.66	\$37.78

[123] 85. In the above tables, excess inventory is calculated by subtracting the 1952 inventory of hardwood and hemlock types from the recommended stocking levels in the 1961 Forest Plan. Mr. Rickard identified excess inventory only in the hardwood and hemlock types. In his testimony, he identified a "forest type" as follows:

[A]n association of species wherein the type name identifies those species that are dominant in the type. For example, on the Menominee Forest, the hardwood type, the volume is about 88 percent hardwood. \* \* \* So when you are operating in a hardwood type, you are operating principally hardwoods, but there are a few other species in there. And similarly with the hemlock. (Tr. 431).

He omitted pine types, because he found them to be on balance understocked, although there were excess inventories within the various pine types. (Tr. 430).

86. Mr. Rickard further testified that stock and stand tables for 1952 were referred to in the 1954 Management Plan, but the information was not available to him. Thus, to compute 1952 hemlock and hardwood type inventory, he took the 1960 inventory stock and stand tables which were available in the 1961 Management Plan and back-dated this data to 1952. (Tr. 431-32). He concluded that the 1952 inventory of the hardwood and hemlock types was 888 MMBF. This results in an annual excess inventory harvest of 7.6 MMBF over a 15-year cutting cycle.

87. Total "potential annual harvest" under the Rickard method is thus 31.2 MMBF.

88. Unlike the Banzhaf study, Mr. Rickard's method does not use actual receipts to determine stumpage value. After comparing the BIA figures with those of sales of inferior quality timber at the Nicolet National Forest, he concluded that the stated values did not reflect the "exceptional value" of the Menominee timber. (Tr. 433-34).

To reach what he called the "full utilization value" for each species, he reversed the calculations by which stumpage values were computed by the BIA from rough lumber prices (the so-called "Delaney formula"), and then subtracted estimated milling, logging and administrative costs. Milling cost estimates were derived from "the Maters' report of the milling operation." (Tr. 435). Logging costs were derived from the [124] Wisconsin Forest Products Price Reviews and "checked \* \* \* against loggers in the area of the Menominee Forest for reasonableness \* \* \*." (Tr. 436). The administrative cost was estimated by the supervisor of the Nicolet National Forest.

88. By this method Mr. Rickard arrived at an average full utilization value of \$39.31 per MBF, as opposed to \$31.54 per MBF using the Delaney formula. This full value amount was checked against the range of stumpage values documented in the Wisconsin Products Price Review for 1961, and found to be within the upper limits of that range. This was deemed to be a confirmation of his method, in light of the acknowledged high quality of the Menominee timber. (*See and compare* the Deed Restriction opinion, Docket No. 134-67-A at p. 21 of the text). Dr. Harkin adopted Mr. Rickard's method as being more accurate than the BIA figures used in the Banzhaf study. (*Id.* at text 21 n.29). Mr. Rickard testified that much of the difference between the full utilization value and the BIA stumpage value is due to defendant's emphasis on sawlog production, to the detriment of veneer log production. (Tr. 438).

89. Mr. Rickard then multiplied the 11.3 MMBF lost harvest (31.2 potential harvest less 19.9 actual harvest) times \$39.31 per MBF. He then added to that amount 19.9 MMBF times \$7.77 per MBF (the full utilization rate of \$39.31 less \$31.34 under the Delaney formula), to compensate for "defendant's failure to prudently exploit the value inherent in the 19.9 MMBF sold on an annual

basis." The total damages thus computed amounts to \$5,886,460. To this total Mr. Rickard added alternatively 5 percent or 10 percent per year as a "reasonable expectation of productivity of the lost funds." (Tr. 439). This brings the "full loss" as of December 1, 1961 to \$15,592,231, or \$41,214,199, respectively.

*C. Calculation of Post-Termination Damages*

90. As shown in the tables following this finding, Mr. Rickard calculated post-termination damages by reference to data contained in the 1961 Management Plan. (Rickard tables B-1, 2). He found total annual growth available for harvest to be 28.7 MMBF. He then subtracted the pine growth of 5.6 MMBF, since the pine type had a net inventory deficit and additional growth would be needed to correct this understocking. To this net growth amount of 23.1 MMBF he added excess inventory of the hardwood and [125] hemlock types of 8.1 MMBF. Finally, he added 4.3 MMBF to reflect "understocked pine, priority trees." He defined "priority trees" as:

[T]rees that are scheduled for harvest because they are high risk trees. They are trees that are likely not to be there next time, or to be dead, or to be in advance stages of deterioration or decay, and they are scheduled in the plan, in the 1961 plan, they are scheduled for harvest without regard to growth or excess inventory, because there is just no reason to leave them. (Tr. 443).

This results in a total potential annual cut of 35.5 MMBF.

TABLE B  
VALUE LOST THROUGH MISMANAGEMENT OF MENOMINEE FOREST  
F.Y. 1962 through November 1971

Potential Annual Cut	35.5 MMBF		
Actual Annual Cut	27.2 MMBF (20.4 sawlog, 6.8 cordwood)		
Actual Annual Loss	8.3 MMBF (\$34.10) full utilization <sup>1</sup>		
Annual Loss Value	-----	\$283,030 for 10.17 years =	\$2,878,415
F.Y. 1962-1971		Annual Loss	
Value of 1/yr/10.17 yr.	=	Capitalization Factor	Full Value Lost
10% (20% before tax)	=	16.378	\$4,635,465 <sup>2</sup>
5% (10% before tax)	=	12.855	\$3,638,351

<sup>1</sup> The average year's net stumpage for proper utilization, after capital gain tax: (\$37.99 - 23.05 Basis) (74%) + 23.05 Basis = \$34.10. The Basis or Book Value is our appraisal of 1961 timber value of \$32,601,900 ÷ 1,414.4 MMBF inventory = \$23.05/MMBF. The tax rate of 26% leaving a net 76% gain, is an average of 25% for 8 years and 30% for the 2 years following the tax law change as of January 1, 1970.

<sup>2</sup> Recommended as realistic since industrial enterprises such as this characteristically face the need for funds that return benefits of 10% after taxes.

[127]

TABLE B-1

POTENTIAL HARVEST  
Millions Board Feet

1962	1971	
Overstocked Hardwood, Hemlock & Aspen . . . Growth		23.1
	Excess Inventory	8.1
Understocked Pine	Priority Trees	<u>4.3</u>
Total From the Forest's 1960 Plan		35.5



TABLE B-2

## POTENTIAL HARVEST

Menominee Sawtimber Types 1960  
(continued)Millions of Board Feet  
1962 1971

Annual Cut Components MMBF

Timber Type	Growth	Excess Inventory	Growth & Inventory	Priority Trees	Growth & Inventory Priority
Hardwood	11.5	4.3	15.8	0 <sup>3</sup>	15.8
Hemlock	7.2	3.8	11.0	0 <sup>3</sup>	11.0
Pine	5.6	(9.2)	0 <sup>1</sup>	4.3 <sup>4</sup>	4.3
Aspen	4.4	—	4.4 <sup>2</sup>	0 <sup>5</sup>	4.4
Total Sawtimber Types	28.7	(1.1)	31.2	4.3	35.5

<sup>1</sup> Growth will require almost 2 cycles to develop 1960 planned inventory. It cannot be expedited by reducing cut in other overstocked types.

<sup>2</sup> Assumes aspen inventory is not significantly high or low. No data.

<sup>3</sup> Will be favored for harvest in the process of harvesting excess inventory especially, and growth too. Though they are priority they are the dominant factor in excess inventory as well as the most efficient place to harvest growth.

<sup>4</sup> From 1960 plan. Priority trees that cannot help the low pine inventory because of their individual condition and will be cut anyway,  $30,133 \div 7 \text{ yrs.} = 4,305$ .

<sup>5</sup> No data on aspen priority trees.

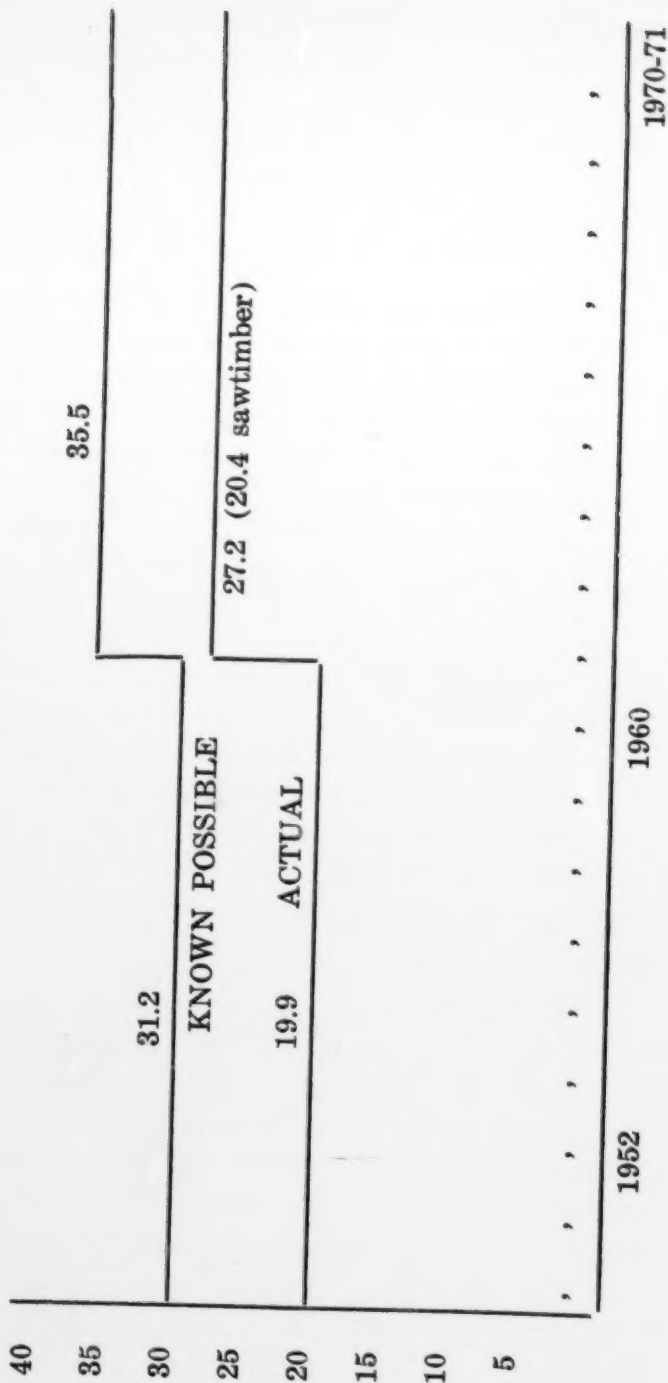
## TABLE B-3

## POTENTIAL HARVEST

Millions Board Feet	
1962	1971
(1960 Forest Plan)	
True Allowable	35.5
Official Allowable (Ignores growth!)	30.3
Actual Harvest	27.2 (Too rigid harvest area)

TABLE C  
Timber Harvest—Menominee County  
Millions of Board Feet/Year

MMBF



[131] 91. The "Official Allowable" cut set out in the 1961 Management Plan was 30.297 MBF. (D. Ex. 46-R at 48). The actual yearly cut during the period between 1961 and 1971 was 27.2 MMBF, as derived from data in the 1968 Forest Plan and annual reports of the Menominee Corporation. (Tr. 446). Mr. Rickard explained the notable differences between the two cuts at trial:

[The official allowable] cut was determined by scheduling a harvest that would remove excess inventory, and adding to that the harvest of priority trees. That was the whole method of calculating the allowable cut in 1961, or in the 1961 Plan. Growth was not accounted for, in calculation of that allowable cut. That is principally the reason why it is so low. The actual harvest was below even the calculated allowable cut because the method for securing it as laid out in the 1961 plan was highly inflexible and didn't allow the forest managers to actually find this allowable cut. The harvest areas were rigidly compartmentalized and did not take account of the well-known fact that average volumes from an inventory vary up and down quite a lot from point to point, from area to area. (Tr. 445).

92. Mr. Winslow also testified at trial as to the effect of the 1961 plan:

The [1961] management plan was enforced in such a way that there was not flexibility to move into areas that were not scheduled for cutting in a particular year to make up the volume that was unavailable in that year's cutting compartment. (Tr. 191).

Thus, if an area designated in the plan contained more than the established amount, the cut was nevertheless limited to that amount; and if an area contained less than the established amount the excess in other areas could not be used to make up the difference. The net

result of a lower than planned cut was unavoidable under this inflexible plan.

93. The full utilization value of the timber in the 1961-71 period, based on open market stumpage values obtained from chief forester of Menominee Enterprises, Inc. (Tr. 447) and weighted by [132] use and species, was found to be \$37.99 per MBF. That amount, reduced by capital gains tax because during this post-termination period the income of the tribe was subject to taxation, produced a weighted average full utilization value of \$34.10 per MBF. Total annual loss, the product of the full utilization value (\$34.10) and the potential harvest (35.5 MMBF), is \$2,878,415 for the 10-year period.

Mr. Rickard then computed the "full value" lost to the Menominees for this period, by adding 10 percent after-tax earnings rate as a "reasonable expectation of productivity from these funds." The final total is \$4,635,465.

94. Defendant objects to plaintiffs' claim for any post-termination damages, arguing that such a claim is barred by the Reuss amendment to the Menominee Termination Act, Act of July 14, 1956, 70 Stat. 549, because the Act imposed a sustained yield requirement after termination of Federal supervision. Specifically, the Reuss amendment included a provision to the effect that:

The sustained yield requirement contained in this act shall not be construed by any court to impose a financial liability on the United States.

Plaintiffs premise the claim for post-termination damages upon the 1961 Management Plan, which was the initial concrete implementation of the sustained yield requirement of the Reuss amendment. The 1961 Management Plan became effective only upon termination of federal management and supervision in April 1961. Since this post-termination management plan is relevant

to plaintiffs' claim for post-termination damages, defendant argues that the claim is barred by the above-cited provision exempting the United States from liability for sustained yield management after termination.

95. Although the 1961 Management Plan was implemented after termination, it had been prepared and drafted by defendant and the State of Wisconsin *prior to* termination. It was based on defendant's pre-termination inventory data, compiled as of March 1958. (D. Ex. 44-R at 1). The management plan was drafted by defendant's representative, Mr. Winner, who had also formulated earlier management plans for the forest. His basic policies and approach to forest management were carried over into the 1961 plan.

[133] 96. Defendant also urges that plaintiffs' calculations of damages (both pre and post-termination) overstate the actual injury to the tribe, since any overstocking in the forest during the 1950's would remain there, and would be obtained by plaintiffs upon termination. Defendant calculates the value of the uncut timber as the difference between the 1961 value of the actual harvest from 1952-1960, and the 1961 value of the realistic harvest, as determined in the Banzhaf Report. This amount is calculated at \$2,056,713.

97. This issue was explored by defendant in the course of cross-examination of plaintiffs' expert, Mr. Winslow:

[Mr. Beal]: What happened to the trees of the Menominee Forest that were not harvested because your realistic annual cut was not followed?

[Mr. Winslow]: I am sure many of them died because of mortality. Many of them remained on the forest occupying growing space that could have been occupied by more rapidly growing trees, whose value of growth would have been greater. Younger trees that normally take their place in the stand were not



given the opportunity to mature into trees that would later become crop trees.

\* \* \* \* \*

Some mortality, a large part of the mortality that was lost due to the overstocking, was lost forever to the Menominees. (Tr. 324).

98. Mr. Banzhaf also testified that overstocking caused mortality loss because of undernourishment, and also because of a reduction in the growth rate, as follows:

[Mr. Iadarola]: You mentioned a forest that was overstocked, why would an overstocked forest injure or damage the Menominees?

[Mr. Banzhaf]: See, forests are like most living things. They have to have adequate moisture. They have to have adequate nourishment.

Now, in the case of a forest, a forest has to have sunlight, because the action of the sun on the leaves produces food. It has to have adequate nourishment from the soil. It has to have adequate water from [134] the soil.

Now, the more stems or trees you have per acre, the greater, of course, the competition for the nourishment, sunlight and water that is available. It follows that an overstocked forest tends to become a stagnated forest. And, of course, undernourished living things tend to die, and that means that mortality would be increased, and trees are part of the capital assets of the tribe, or were, and therefore, it would be a capital loss here that would not be recoverable.

[Mr. Iadarola]: How about the growth factor?

[Mr. Banzhaf]: I should have included that.

Of course, the growth factor would be reduced. You do not get maximum growth in an overstocked forest. (Tr. 157-58).

99. The 1961 Management Plan notes that in the forest's then overstocked condition hardwood mortality loss was approximately 60 BF/acre/year. (P. Ex. B-12 at 21). At "recommended optimum" stocking levels, mortality loss was estimated at 20 BF/acre/year. (*Id.*) Therefore, mortality loss attributable to overstocking is 40 BF/acre/year. Pine and hemlock types show similar or higher mortality loss figures. (*Id.* at 25, 26).

100. Assuming this rate to be accurate for all timber types, loss due to mortality in the total 131,000 sawtimber acres (*Id.* at 15) would amount to 5.24 MMBF annually, and 48.9 MMBF over the full 9.33-year post-termination period. This represents 73 percent of defendant's claimed 66.8 MMBF of timber still remaining in the forest after termination. After a further conservative reduction of 7 percent for the reduced growth rate in the forest, the total offset amounts to only 20 percent of defendant's original claim, or \$411,342. This amount represents the value of the uncut timber that should have been, but was not, harvested during the period under consideration and that remained available for harvest upon federal termination.

#### IV. THE STATUTE OF LIMITATIONS ISSUE

101. This case was filed April 25, 1967. The applicable statute of limitations requires that any claim must be filed within 6 years from the date it accrues. Defendant argues that plaintiffs' claim accrued when the 1961 plan became available, since it contains all of the forest data necessary to formulate plaintiffs' allegations. Since "[t]he Plan was available to all parties prior to April 26, 1961," it is argued that the claim is [135] barred by the 6-year statute of limitations.

102. Plaintiffs' response is that the "mere existence" of the 1961 plan is of no importance, since its impact was "inherently unknowable or incapable of comprehension by plaintiffs."

The Menominees could not reasonably have known of this claim until a sufficiently reasonable time after they assumed management control of their forest (April 30, 1961). Only then could they acquire knowledge of the intricacies and technicalities of proper forest management, either through their own study or by the employment of recognized experts in the field.

Since any date after termination on April 29, 1961 falls within the 6-year statute of limitations, plaintiffs conclude that the claim is timely.

### ULTIMATE FINDINGS OF FACT

103. Defendant is accountable to plaintiffs for damages arising out of defendant's mismanagement of the Menominee Forest prior to termination from January 1, 1952 to April 29, 1961. From the time of the publication of the Stand and Structure Analysis dated January 1, 1952, defendant knew or should have known that the 20 MMBF harvest limitation was the principal and controlling cause of substantial underproductivity in the Menominee Forest.

104. As trustee of the forest, defendant was obligated to be cognizant of existing forest conditions, and to inform Congress of the need to increase the harvest ceiling. Defendant is liable for its failure to recognize the inadequacy of the 20 MMBF annual cut limitation based on inventory data available to it in 1952. It is also in breach of trust for failing to supplement and refine the 1952 data expeditiously.

105. The injuries to the Menominee Forest were perpetuated into the post-termination period by the 1961 Management Plan. Defendant is therefore also liable for damages accruing after termination of federal control on April 29, 1961 and through the end of the 1971 fiscal year on November 1, 1971.

[136] 106. Damages are computed as follows:

PRE-TERMINATION DAMAGES

Banzhaf realistic annual harvest		
(—) actual harvest receipts		
January 1, 1952 through April 29, 1961	.....	\$3,571,225
Rickard potential annual harvest		
(—) actual harvest receipts		
9.83 year period	.....	\$5,886,460
TOTAL DAMAGES (i.e., average of both		
pre-termination damage totals)	.....	\$4,728,842
(—) 1961 value of uncut potential		
harvest still available for harvest		
(i.e., timber not rendered worthless		
by mortality loss)	.....	\$ 411,342
TOTAL PRE-TERMINATION DAMAGES	.....	\$4,317,500

POST-TERMINATION DAMAGES

Rickard realistic annual harvest		
(—) actual harvest receipts		
April 30, 1961 - November 1, 1971	.....	\$2,878,415
TOTAL DAMAGES	.....	\$7,195,915

107. Plaintiffs' claim for an additional 5% or 10% per annum, allegedly representing "the use the Menominees could have made of the losses they incurred," is rejected as an unallowable claim for interest on the damages awarded.

108. The total for post-termination damages in finding 106 *supra*, represents the extent of post-termination damages up to a date shortly before trial. This is without prejudice to plaintiffs' asserted right to damages, if any, incurred after trial, subject to offset of the value, if any, of uncut timber still available for harvest during the corresponding period.

[137] CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiffs are entitled to recover the sum of seven million, one hundred ninety-five thousand, nine hundred fifteen dollars (\$7,195,915) as damages for defendant's mismanagement.



(3)  
No. 83-1922

**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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**MENOMINEE TRIBE OF INDIANS, ET AL., PETITIONERS**

*v.*

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether this damage action brought by the Menominee Tribe of Indians against the United States based on asserted mismanagement of the Tribe's forest resources is barred by the six-year statute of limitations in 28 U.S.C. 2501.

2. Whether deed restrictions included in the Menominee Tribe's termination plan adopted pursuant to the Menominee Termination Act give rise to a claim for breach of trust that may be brought under 28 U.S.C. 1491 or 1505.



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## **OPINIONS BELOW**

The opinion of the court of appeals with respect to the “deed restrictions” claim (Pet. App. 1a-12a) is reported at 726 F.2d 712, and the trial judge’s opinion with respect to that claim (Pet. Supp. App. 1a-196a) is unreported. The opinion of the court of appeals with respect to the “forest mismanagement” claim (Pet. App. 13a-23a) is reported at 726 F.2d 718, and the trial judge’s opinion with respect to that claim (Pet. App. 197a-330a) is unreported.

## **JURISDICTION**

The judgment of the court of appeals with respect to the deed restrictions claim was entered on Decem-

ber 30, 1983, and the judgment of the court of appeals with respect to the forest mismanagement claim was entered on January 24, 1984. A petition for rehearing was denied on February 16, 1984 (Pet. App. 24a). On March 16, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 28, 1984, and the petition was filed on May 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Menominee Indian Reservation in Wisconsin was established by the Treaty of Wolf River of 1854, United States—Menominee Tribe, 10 Stat. 1064 *et seq.* (Pet. Supp. App. 8a n.12). A century later, in 1954, Congress implemented its then-current termination policy by enacting the Menominee Termination Act (ch. 303, 68 Stat. 250 *et seq.*), which provided for the elimination of federal supervision over the Menominee Tribe (the Tribe). Under the Termination Act, the Tribe was to formulate a plan for future control of tribal property and service functions theretofore undertaken by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property held in trust by the United States for the Tribe. The Termination Act further provided that, after transfer to the Tribe of title to property previously held in trust by the United States, tribal members were not to be entitled to special services performed by the United States for Indians and that all statutes specifically affecting Indians would no longer be applicable to the Tribe. The Act was fully carried out. See *Me-*



*nominee Tribe v. United States*, 391 U.S. 404, 408-409 (1968).<sup>1</sup>

2. Dissatisfied with Congress's termination decision and its results, the Tribe and certain of its representatives and members filed an action in the Court of Claims under 28 U.S.C. 1491 and 1505 on April 25, 1967. The central thrust of the claim was that passage and implementation of the Termination Act constituted a breach of trust owed by the United States to the Menominees.

On July 19, 1978, the trial judge filed an opinion and findings of fact on the question of liability, without determining damages (Pet. App. at 20a-124a, *Menominee Tribe v. United States*, 445 U.S. 950 (1980)). The trial judge concluded that the Menominee Termination Act was not in petitioners' best interest and was ill-advised and that passage of the Act constituted a breach of Congress's fiduciary obligation to petitioners (*id.* at 51a-54a).

The Court of Claims, sitting en banc, unanimously reversed. *Menominee Tribe v. United States* (*Menominee Basic*), 607 F.2d 1335 (Ct. Cl. 1979). The court did not reach the question whether there had been a breach of some duty by Congress in terminating federal supervision of the Menominee Tribe. Instead, the Court of Claims rested its holding on jurisdictional grounds. The court noted that the trial judge had "assumed without discussion that there was jurisdiction over all Indians claims for breach of trust, of whatever character, and made absolutely no distinction \* \* \* between the actions of Congress set-

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<sup>1</sup> Subsequently, in the Menominee Restoration Act of 1973 (25 U.S.C. 903, *et seq.*), Congress restored federal recognition and supervision to the Menominee Tribe.

ting policy and directing conduct and the conduct of executive officials contrary to Congressional policy and directives" (*id.* at 1339 n.5). The Court of Claims drew such a distinction, however, and held that the controlling jurisdictional statutes, 28 U.S.C. 1491 and 1505, did not give it "authority to entertain a suit contending that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians" (*id.* at 1339 (footnote omitted)). The Court of Claims remanded the case to the trial judge for reconsideration of certain issues to the extent they were not barred by its decision. 607 F.2d at 1338 n.2, 1347. This Court denied the Tribe's petition for a writ of certiorari to review the Court of Claims' holding that it was without jurisdiction over claims based on the enactment and implementation of the Termination Act. *Menominee Tribe v. United States*, 445 U.S. 950 (1980).

a. On remand, petitioners alleged in their "forest mismanagement" claim that the Secretary had mismanaged the Tribe's forest resources by failing to obtain from Congress an increase in the statutory limitation on the harvesting of timber that had been established by Congress in a statute passed in 1908 (Pet. Supp. App. 41a-43a). The trial judge rejected the government's argument that this claim, filed on April 25, 1967, was barred by the six-year statute of limitations under 28 U.S.C. 2501 because the alleged mismanagement resulting from underproductivity commenced in 1952 (Pet. Supp. App. 236a-238a). The trial judge awarded the Tribe \$7,195,915 for damages occurring both before and after the effective date of the termination on April 30, 1961 (Pet. App. 13a & n.1).

The court of appeals reversed (Pet. App. 13a-23a). The court of appeals held that the claim for damages accruing prior to April 25, 1961—six years prior to the filing of this suit—was barred by the six-year statute of limitations in 28 U.S.C. 2501 (Pet. App. 20a). The court held that the existence of a trust relationship between the United States and the Tribe prior to termination did not toll the running of the limitations period and that the facts regarding the alleged undercutting of the forest were not inherently unknowable to the Tribe (*id.* at 17a-20a). The post-termination damage claim was based on the Tribe's argument that the injuries to the Menominee Forest were perpetuated into the post-termination period by the 1961 Management Plan (Pet. App. 20a). The court of appeals held, however, that because the Management Plan was "an integral part of the termination ordered by Congress in the Termination Act" (Pet. App. 20a), under *Menominee Basic*, the Court of Claims and Claims Court had no jurisdiction over claims based on the contents of that Plan (Pet. App. 20a-22a).

b. In the "deed restriction" claim, the Tribe argued that two provisions in the deed by which the United States conveyed to the Tribe the property previously held by the United States in trust for the Tribe constituted either a breach of fiduciary duty or a taking of property for which the Fifth Amendment required the payment of compensation. One of the deed provisions required that the forest be managed on a sustained-yield basis until released from that requirement under the laws of Wisconsin or by Act of Congress (Pet. App. 3a). The second provision barred the transfer or encumbrance of the lands by the Tribe for a period of 30 years without

the prior approval of the State Conservation Commission and the Governor of Wisconsin, unless prior to that time the forest was released from the sustained-yield requirement under the laws of Wisconsin (*ibid.*). The trial judge agreed with the Tribe that these deed restrictions amounted to either a breach of fiduciary duty or Fifth Amendment taking for which compensation could be awarded by the Court of Claims.

The court of appeals, however, reversed. It reasoned that under the Court of Claims' prior decision in *Menominee Basic*, jurisdiction did not lie under 28 U.S.C. 1491 and 1505 over the Tribe's claim for damages resulting from the congressional decision to terminate federal supervision over the Menominees. The court found that the deed restrictions to which the Tribe objected "fully accorded" with the Termination Act and therefore likewise "gave rise to no justiciable claim for breach of trust" (Pet. App. 5a). The court also rejected the contention that the deed restrictions resulted in a Fifth Amendment taking. The court explained that the sustained yield requirement was simply a "continuation of a regulatory requirement which had long existed for the Menominee forest and which Congress considered important for the future economic health of the Tribe" (Pet. App. 9a) and that the 30-year restraint on alienation was lawful because "[r]estrictions on alienation are common with respect to Indian lands" and the United States "could lawfully condition the transfer of the land to the Tribe on the latter's agreement not to alienate the land for a period of thirty years" (*id.* at 11a (footnote omitted)).

## ARGUMENT

The judgments of the court of appeals are correct and do not conflict with any decision of this Court or any court of appeals. Petitioners raise no constitutional claim (Pet. i) and do not challenge (see Pet. 21) the correctness of the Court of Claims' decision in *Menominee Basic*, which this Court previously declined to review. Petitioners now simply challenge the court of appeals' application of the *Menominee Basic* ruling and the six-year statute of limitations to the particular circumstances of the two claims involved here. These rulings raise no issues of general importance warranting review by this Court.

1. Petitioners first contend (Pet. 14-20) that the court of appeals erred in holding that their claim based on alleged mismanagement of the forest on or before April 25, 1961—six years before this suit was filed on April 25, 1967—is barred by the six-year statute of limitations in 28 U.S.C. 2501. That section provides that “[e]very claim” of which the Claims Court has jurisdiction “shall be barred” unless brought within six years after such claim “first accrues.”

a. As an initial matter, quite aside from the bar of the statute of limitations, the Claims Court could not entertain the forest mismanagement claim under 28 U.S.C. 1491 and 1505. The “mismanagement” the trial judge found for the period prior to April 1961 was essentially that the forest was undercut because timber was not harvested in excess of 20 million board feet (MMBF) annually (Pet. Supp. App. 329a). However, that 20 MMBF limitation was imposed by Congress in the Act of Mar. 28, 1908, ch. 111, 35 Stat. 51 *et seq.* For the reasons given by the Court of Claims in *Menominee Basic*, the Court



of Claims (and now the Claims Court) did not have jurisdiction under 28 U.S.C. 1491 and 1505 over a claim for damages based on a determination by Congress itself embodied in a duly enacted law. Petitioners seek to avoid this conclusion by arguing that damages nevertheless may be recovered for the failure by Interior Department officials to seek an amendment of the statutory limitation after they allegedly determined that the 20 MMBF ceiling was too low. See Pet. 10-11. Nothing in 28 U.S.C. 1491 or 1505 suggests that Congress intended to provide for the award of damages based on the Executive's failure to seek an amendment of the terms of an existing law.

Section 1491(a)(1) provides for recovery on claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department."<sup>2</sup> That language, referring to existing provisions of law, does not include within its sweep acts or omissions of the Executive in proposing to Congress that it change existing law. When performing the latter function, the President and those acting on his behalf are not executing the law; they are instead participants in the legislative process, pursuant to the authority conferred on the President by Article II, Section 3 of the Constitution to recommend for Congress's consideration "such Measures as he shall judge necessary and expedient." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The performance or nonperformance of that function would appear to

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<sup>2</sup> Section 1491(a)(1) also provides for the award of damages based upon "any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," but petitioners do not contend that jurisdiction lies under these provisions.



present a political question, because the recommending function is textually committed to a coordinate branch (see *Baker v. Carr*, 369 U.S. 186, 217 (1962)) by virtue of the provision for recommendation by the President of such measures as "he"—not a court—"shall judge necessary and expedient." And even if the Executive had recommended legislation to raise the 20 MMBF limitation, it would be entirely speculative whether Congress would have enacted it and thereby alleviated the "injury" caused by the 1908 Act.

Against this background, Congress cannot be held to have created a cause of action for damages based upon the Executive's role in the legislative process absent a clear and unambiguous expression of congressional intent to do so. No such expression is present here. To the contrary, the language of 28 U.S.C. 1491 plainly does not embrace such a cause of action. The scope of 28 U.S.C. 1505, which provides for damage actions by Indian tribes, is identical (see *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 539-540 (1980); *United States v. Mitchell (Mitchell II)*, No. 81-1748 (June 27, 1983), slip op. 5-6 n.8) and therefore likewise does not authorize the recovery of damages on the basis of the Executive's failure to seek a statutory amendment.

The conclusion that the Court of Claims and Claims Court had no jurisdiction over petitioners' claim in this regard also is compelled by the decision in *Menominee Basic*. There the Court of Claims held that "the United States cannot be held liable for Interior's affirmative actions or passive omissions with respect to the passage and implementation of the Termination Act." 607 F.2d at 1345. The same must be true as regards Interior's actions or omis-

sions with regard to Congress's failure to pass an amendment to the 1908 Act that imposed the harvest limitation.

b. In any event, the court of appeals correctly concluded that petitioners' claim based on alleged forest mismanagement prior to April 26, 1961 is barred by the statute of limitations in 28 U.S.C. 2501. Petitioners seek to avoid the application of the statute of limitations by arguing (Pet. 17-20) that the running of the limitations period should be deemed tolled because of the existence of a trust relationship between the United States and the Tribe and because petitioners did not have knowledge of the government's assertedly wrongful conduct. Neither argument has merit.

The suggestion that the six-year statute of limitations is inapplicable because of the existence of a "trust" relationship would have the effect of rendering the limitations period inapplicable with respect to the vast majority of claims brought by Indian tribes under 28 U.S.C. 1505, since most plaintiff tribes would have a relationship with the United States that could be characterized as one of "trust." Congress clearly did not intend to exempt tribal claims from the generally applicable six-year limitations provision in this manner. To the contrary, it provided that "[e]very claim of which the United States Claims Court has jurisdiction" is barred unless brought within six years (28 U.S.C. 2501 (emphasis added)), and the legislative history of 28 U.S.C. 1505 makes clear that tribal claims are "subject to the same conditions and limitations, and the United States shall be entitled to the same defenses both at law and in equity, . . . as in cases brought in the Court of Claims by non-Indians under [28 U.S.C.

1491].’” H.R. Rep. 1466, 79th Cong., 1st Sess. 13 (1945), quoted in *Mitchell I*, 445 U.S. at 539.

Also unavailing is petitioners’ attempt to invoke the holding in *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949), that a claim under the Federal Employee Liability Act does not accrue until the injury has manifested itself and that the statute of limitations therefore does not begin to run while the injury is “inherently unknowable” and the plaintiff accordingly can show “blameless ignorance” of it. Even assuming that this principle is applicable in suits against the United States such as that involved here, it is of no assistance to petitioners in the circumstances of this case.<sup>3</sup>

The injury to the forest resulting from undercutting clearly was not “inherently unknowable,” as in *Urie v. Thompson*, *supra*. The trial judge found

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<sup>3</sup> With one exception, all of the decisions cited by petitioners at Pet. 19 n.39 are Federal Tort Claims Act cases in the special context of medical malpractice (see also *United States v. Kubrick*, 444 U.S. 111, 122 (1979)), and thus do not have direct application here. The one exception is *Japanese War Notes Claimants Ass’n v. United States*, 373 F.2d 356 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967), which involved a claim under the Tucker Act based on the Army’s distribution of counterfeit Japanese currency in the Philippines during the Second World War. Any conflict with that decision of the Court of Claims and the decision below would essentially be an intracircuit conflict not warranting this Court’s review. In any event, the court below considered the Court of Claims’ decision in the *Japanese War Notes Claimants* case and correctly found it inapposite here on the ground that the alleged injury of which petitioners complain was neither concealed by the United States nor “inherently unknowable” (Pet. App. 17a-18a).

that petitioners' claim first arose on January 1, 1952, when the Department of the Interior published the Menominee Forest Stand Structure Analysis, which the district court determined gave notice that the harvest limitation of 20 MMBF annually, established by Congress in 1908, caused underproductivity in the forest (Pet. Supp. App. 329a). That document necessarily also put petitioners on notice of their claim of underproductivity. In addition, as court of appeals observed (Pet. App. 18a):

The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. In 1956, acting on a resolution of the Menominee Council, Congress made one increase in the statutory harvest limitation (said by the Indians to be insufficient). The Tribe had successfully carried on the earlier suit (on another basis) against the United States for forest mismanagement and entered into a substantial settlement in 1951. *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). At least from 1954 onward, the Indians and their attorneys participated actively in the Congressional consideration of termination and in the preparation of the termination plan. Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claims. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable". See *Affiliated Ute Citizens v. United States*, \* \* \* 199 Ct. Cl. 1004 (1972).

Moreover, throughout the termination process, petitioners were ably represented by "skilled attorneys." *Menominee Basic*, 607 F.2d at 1346. The same attorneys who represented petitioners in their forest mismanagement claim in *Menominee Tribe v. United States*, 91 F. Supp. 917 (Ct. Cl. 1950), and during the termination process, 26 Fed. Reg. 3727 (1961), also represented them in the trial of this action (Pet. App. 198a). For this reason as well, petitioners' assertion that the running of the statute of limitations should be tolled because of their ignorance and lack of notice is without merit. In fact, petitioners appear to concede that the circumstances of this case do not satisfy the rule of *Urie v. Thompson*, *supra*, observing that "[a] non-Indian might not be able to avoid the statute of limitations on the ground of 'blameless ignorance' if the facts of the government's wrong were discoverable through the use of expert assistance or other means" (Pet. 17-18). They simply argue (Pet. 18) that the standard should be relaxed for Indian claimants. That argument is flatly inconsistent with the unambiguous congressional intent underlying 28 U.S.C. 1505 that tribal claims are to be subject to the *same* limitations as claims by non-Indians. See pages 9, 10-11, *supra*.<sup>4</sup>

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<sup>4</sup> Petitioners' reliance on this Court's 1983 decision in *Mitchell II* in support of a special tolling rule is misplaced. The *Mitchell* decisions involved the existence of a cause of action against the United States, not the application of the statute of limitations to such a claim. Moreover, the Court in *Mitchell II* reiterated the holding of *Mitchell I* that 28 U.S.C. 1505 "provides tribal claimants the *same* access to the Court of Claims provided to individual claimants under 28 U.S.C. § 1491" (slip op. 5-6 n.8 (emphasis added)), citing 445 U.S. at 538-540). In *Mitchell I*, at the pages cited, the Court made

2. The court of appeals also correctly concluded that the Court of Claims—now the Claims Court—did not have jurisdiction over petitioners' claim for damages resulting from two restrictions in the deed by which the land was conveyed to the Tribe. The provision for the forest to be managed on a sustained-yield basis was a continuation of the regime under the 1908 Act and was required by the Termination Act itself, which provided that "[t]he [termination] plan shall contain provision for protection of the forest on a sustained yield basis" (Pub. L. No. 85-490, § 1(b), 72 Stat. 291; Pet. App. 28a). Under *Menominee Basic*, that congressional judgment cannot form the basis for liability by the United States under 28 U.S.C. 1491 and 1505. And if there could be any doubt on the question, the Termination Act itself explicitly provided that the "sustained yield management requirement \* \* \* shall not be construed by any court to impose a financial liability on the United States" (§ 1(b), 72 Stat. 291; Pet. App. 28a-29a).

Petitioners contend (Pet. 23 n.45), however, that they are not really objecting to the sustained-yield provision as such, but rather are objecting to what they assert was a requirement that the sustained-yield provision be administered for the benefit of the State of Wisconsin rather than the Indians. There is no support for this assertion. To be sure, the plan did state that the deed would contain the sustained-yield covenant "for the benefit of the State of Wisconsin" (Pet. App. 3a). But as the court of appeals

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clear that Indians are to be subject to the same limitations and defenses as non-Indians. Petitioners' suggestion of a special tolling rule for Indian claimants therefore is inconsistent with the *Mitchell* decisions.



held, this reference “merely gave the State the power to enforce the restrictions if they were violated” (*id.* at 8a n.9); it did not purport to give the State of Wisconsin authority to insist upon administration of the forest in a manner that was contrary to the Tribe’s interest. The deed also provided that the sustained-yield requirement would continue until the lands were released from it under the laws of Wisconsin or by Act of Congress (*id.* at 3a). This provision also is consistent with the Termination Act, which required the Secretary to ensure that the termination plan “conforms to applicable Federal and State law” (§ 1(b), 72 Stat. 290). Moreover, as the court of appeals observed (Pet. App. 6a), if the Secretary was authorized to insist upon the sustained-yield restriction on a permanent basis after conveyance, as he plainly was, it is difficult to see how the provision for an *earlier* release from that restriction could have harmed the Tribe. And as the court of appeals further noted (*id.* at 6a n.6), even if the deed restriction had been lifted by state law, the Tribe would not have been compelled to abandon the sustained-yield program.

Similarly, the 30-year restraint on alienation does not give rise to a cause of action for damages. Although that provision was not explicitly mandated by the Termination Act itself, the provision was, as the court of appeals concluded, “fully consonant” with the Act. It was intended to enforce the sustained yield requirement that *was* mandated by the Termination Act and was part of an arrangement under which the Tribe received a state tax advantage and thus served to promote the economic success of the Tribe. See Pet. App. 7a. Because the 30-year restraint on alienation was consistent with, not in vio-

lation of, the Termination Act, it cannot, under *Menominee Basic*, give rise to a damage action.

Indeed, in light of petitioners' repeated insistence that termination was ill-advised and in light of the resumption of the federal trusteeship over the property pursuant to the Restoration Act, it is quite ironic that petitioners should object to the 30-year restraint on alienation, which had the effect of ensuring the retention of the principal tribal asset after termination until passage of the Restoration Act in 1973. We would have thought that any cause of action for damages based on this deed restriction necessarily abated upon passage of the Restoration Act and return of the land to federal trusteeship with the consent of the Tribe. In any event, given the passage of the Restoration Act, any questions regarding this and other provisions in the deed implementing the now-repudiated Termination Act are of no continuing importance even as regards the Menominee Tribe itself. Far less are they of a broader importance warranting this Court's consideration.<sup>5</sup>

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<sup>5</sup> Petitioners assert (Pet. 22-23) that damages may be awarded for the federal government's alleged failure to provide "such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan," as the Secretary was authorized to provide by Section 7 of the Menominee Termination Act, 68 Stat. 251. This contention is insubstantial. First, Section 7 merely *authorized*—it did not direct—the Secretary to furnish such assistance. This is not language that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained'" (*Mitchell II*, slip op. 11, quoting *United States v. Testan*, 424 U.S. 392, 400 (1976), and *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)), especially in the context of a statute that was intended to terminate federal responsibility for the Tribe. Second, as the court observed in *Menominee*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Basic* (607 F.2d at 1346), there is no indication that any request by the Tribe for assistance was turned down, and petitioners cite no such instance. Third, as the court also observed in *Menominee Basic* (*ibid.*):

In view of the precise wording of the Secretary's authority as to assistance, we cannot agree that Interior was required to proffer advice or assistance not sought by the Menominees (who were represented by skilled attorneys) and perhaps not wanted.

No. 83-1922

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

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THE MENOMINEE TRIBE OF INDIANS, *et al.*,  
*Petitioners,*

v.

THE UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONERS

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Dated: September 19, 1984

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1. Our Petition argued that the statute of limitations in the Forest Mismanagement claim was tolled during a period of years when the Menominees, understandably relying entirely on the management of the government foresters, were blamelessly ignorant of the government's failure to cut a sufficient volume of timber in the Menominee forest (Pet. 17). We did not, as the government asserts, advance a "special tolling rule for Indian claimants" that would open the courts to a plethora of presently time-barred Indian claims. (Brief in op. at 14 n.4). Our position is not broadly based upon the Menominees' status as Indians, but, rather, is narrowly based upon

their status as beneficiaries of a *paid* trust involving *income-producing property*.<sup>1</sup>

In *Mitchell*,<sup>2</sup> this Court observed that such a beneficiary is *entitled* to rely on the trustee for management. The beneficiary would not be expected to be educated in highly technical aspects of management of a forest trust estate, and it is undisputed that the Menominees were not so educated.<sup>3</sup> Whether the beneficiary is Indian or non-Indian,<sup>4</sup> whether the trustee is the United States or a private trustee, the fact that highly technical information was available to or produced by a trust manager does not mean it is deemed to have been available to the beneficiary, or even if it was, that it constituted legal notice to the beneficiary that would bar any claim not timely made.<sup>5</sup> As this Court pointed out in *Mitchell*,

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<sup>1</sup> See Act of March 28, 1908, 35 Stat. 51, 3 Kapp. 317, Sec. 4 (App. 42a) which requires the Menominees to pay for the cost of government trust services. See also Annual Rept. of the Secretary of the Interior (1952) at 394. Statistics printed in 1940 indicate that the Tribe paid *all* costs, including "Administration and Support of Forestry" involving their mill and forest industries. Statistical Supp. to Annual Report, CIA, Fiscal Yr. ending 6-30-40, at 27, 29.

<sup>2</sup> *United States v. Mitchell*, 463 U.S. —, 103 S. Ct. 2961, 2973 (1983).

<sup>3</sup> See T.J. Docket 134-67B, op. at 51, Supp. App. 237a.

<sup>4</sup> There are a number of instances where agencies of the United States other than the Bureau of Indian Affairs stand in the role of "trustee," including, but not limited to the Airport and Airways Trust Fund, 49 U.S.C. 1742e(1), (2); the American Printing House for the Blind Fund, 20 U.S.C. 101; various funds held and administered by the Veterans' Administration for the benefit of veterans and their families, *e.g.*, 38 U.S.C. 5205 and 31 U.S.C. 725s(a) (45); Railroad Unemployment Insurance Fund, 45 U.S.C. 358, 361 and Railroad Retirement Account and Trust Funds, 45 U.S.C. 231n.

<sup>5</sup> The fact that the government foresters prepared and printed the "Menominee Forest Standard Structure Analysis in 1952," did not as the government asserts, "put the Petitioners on notice of

"A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagment." <sup>6</sup>

There is no real argument by the government nor did the Court of Appeals conclude that the Menominees actually knew during the period of 1952-1961 or, *by themselves* could have discovered that their forest, *completely healthy to the untrained eye*, was being harmed by severe undercutting.<sup>7</sup> The Court concluded, rather, that the Menominees could have discovered the wrong "if they sought advice." (Pet. App. 18a).

All we are saying is that, in a case such as this one, where, pursuant to congressional directives, the beneficiary completely and justifiably relied upon the paid trustee for technical management of the income-producing for-

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their claim of underproductivity" (Brief in op. at 12). While this highly technical study was promulgated as a working tool for the government "expert" foresters, there is no showing in the record that this material was made available to the Indians or that they would have understood its significance if it had been. While the study indicated that the annual timber harvest could be increased, it was regarded as a "preliminary step" by Defendant's Chief Forester. (See Supp. App. 261a). It certainly gave no indication to a layman that the forest was being severely harmed by the undercutting.

<sup>6</sup> 103 S. Ct. at 2973.

<sup>7</sup> The fact that the Menominees successfully sued the United States for ruinous *clear-cutting* of their forest in the period 1910-1928, a kind of mismanagement obvious to anyone (see the description of the forest in *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 493-497, 91 F. Supp. 917, 924-926 (1950)) does not mean that the Menominees or the lawyers who represented them in the earlier claim (Brief in op. at 13) had any notion that the government had gone to the opposite extreme of "undercutting." Undercutting—which produces a lush-appearing but overmature and unhealthy forest—was not perceivable to anyone but a trained forester armed with detailed inventory and growth data. (See T.J. Docket 134-67B, Op. pp. 20-21, 37. Fdgs. 36, 37, 79). (Supp. App. 212a-213a, 226a, 265a-267a, 328a).

est trust asset, there is no basis for charging the beneficiary with knowledge of the trustee's wrongful conduct based upon the knowledge they might have acquired *if* they had had any inkling that the forest was being undercut and *if* they had consulted an outside expert, and *if* that consultant had been given access to the data collected by the government foresters.<sup>8</sup> Having paid for trust management by the United States<sup>9</sup> the Menominees should not have had to pay again to hire outside consultants to monitor government management of the forest—a forest that was healthy to the untrained eye.

2. The government's assertion that the claim for pre-termination undercutting was beyond the jurisdiction of the Claims Court was not reached by the Court of Appeals. In any event, the jurisdiction of the court is plain under *Mitchell*,<sup>10</sup> since the claim is based on the 1908 Menominee Forestry Act—an Act which had as its purpose “the preservation of the forests of the Menominee Indian Reservation.” (App. 41a). Its terms—requiring the employment of “skilled foresters”—evidenced Congressional intent that the forest should be managed professionally and that Congress recognized the need of trained foresters to accomplish that intent.<sup>11</sup> The essen-

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<sup>8</sup> It is submitted that had the government's standard been applied, the statute of limitations would have been tolled in few, if any, of the classic cases (*see* Pet. at 18-19) defining “unknowable” claims. In each of those cases a proper expert consulted by the plaintiff within the statutory period might have recognized the problem and exposed the negligence or other wrongdoing.

<sup>9</sup> *See* n. 1 *supra*.

<sup>10</sup> *Supra* n. 2.

<sup>11</sup> *See Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950), interpreting the 1908 Act as requiring the Department of the Interior when necessary “to devise some system that would bring about the desired result.” (*Id.* at 499). *See also Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968), where this Court interpreted the Menominee Termination Act and Public Law 280 “in accord with the overall legislative plan.”

tial mismanagement complained of was failure to supply Congress with information obtained by the foresters which established that the 20 MMBF limitation on cutting was destructive of the forest: the proximate result of that mismanagement was failure of Congress to consider repeal or amendment of the limitation.

Congress had over the years shown itself amenable to amending the 1908 Act in accordance with recommendations of the BIA foresters. The BIA as trustee "had a duty to do whatever it was required to do in the circumstances to save the timber." *Oneida Tribe v. United States*, 165 C. Cls. 487, 494 (1964), *cert. den.* 379 U.S. 946. With an apparently cooperative Congress,<sup>12</sup> the circumstances required, at a minimum, that the BIA advise Congress of the need to amend the statute to allow a realistic cut and to justify its view with an explanation based on the data collected.<sup>13</sup> Damage to the Menominee Forest did not result from some failure of the Executive Branch in the ordinary legislative process, but rather followed from a failure to *implement the expressed intent*

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<sup>12</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), cited by the government at p. 8, where the Executive Order complained of effected a plan of action which had been considered and rejected by Congress.

<sup>13</sup> Were this a private trust, the trustee's duty would have been to apply to a court for permission to deviate from the terms of the trust—and it would have been subject to liability had it failed to do so. (Restatement of Trusts, 2d p. 351 (19—)). Such permission is granted to allow the intent of the settlor (in this case Congress) to prevail over the express terms of the trust document (in this case the 1908 Act). *Dartmouth College v. City of Quincy*, 258 N.E.2d 745 (Mass. S.Ct. 1970); *Davison v. Duke University*, 194 S.E.2d 761 (N.C. S.Ct. 1973); *Troost Avenue Cemetary Co. v. First National Bank*, 409 S.W.2d 632 (Mo. S.Ct. 1966); *In re Miller's Estate*, 230 Cal.App.2d 888, 41 Cal. Rptr. 410 (1965); *Donnelly v. National Bank of Washington*, 179 P.2d 333 (Wash. S.Ct. 1947).

of Congress in the 1908 Act, a failure to properly monitor the trust asset and provide Congress with the information it needed to assure the continued health of the Menominee Forest.<sup>14</sup>

But even if the government's argument had merit, it would still not wipe out that part of our claim which is based upon the negligent failure of BIA foresters to cut the proper kind of timber within the 20 MMBF limitation. (Pet. p. 12). This mismanagement could and should have been corrected soon after the BIA had completed its first inventory of the forest in 1952. Correction required no action by Congress and was in fact indicated by BIA regulations 25 CFR § 62.6 (after 1958 § 143.6), which required management of the Menominee Forest to produce the best income from a given log.

### CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 19, 1984

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<sup>14</sup> A comparison of the 1908 Act (App. F. p. 41a) with the 1910 Act, 25 U.S.C. 406, 407 involved in *Mitchell*, makes clear that the Acts are indistinguishable as bases for court jurisdiction over claims based upon federal mismanagement of Indian timber assets. If anything, the 1908 Menominee Act imposes a higher degree of trust responsibility on the United States. *Menominee Tribe v. United States*, 101 Ct. Cls. 10, 19-20 (1944).